

No. 16041 ✓

United States
Court of Appeals
for the Ninth Circuit

CHARLES E. SMITH, Appellant,

VS.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

Appeal from the District Court for the Territory of
Alaska, Third Division

FILED

SEP 19 1958

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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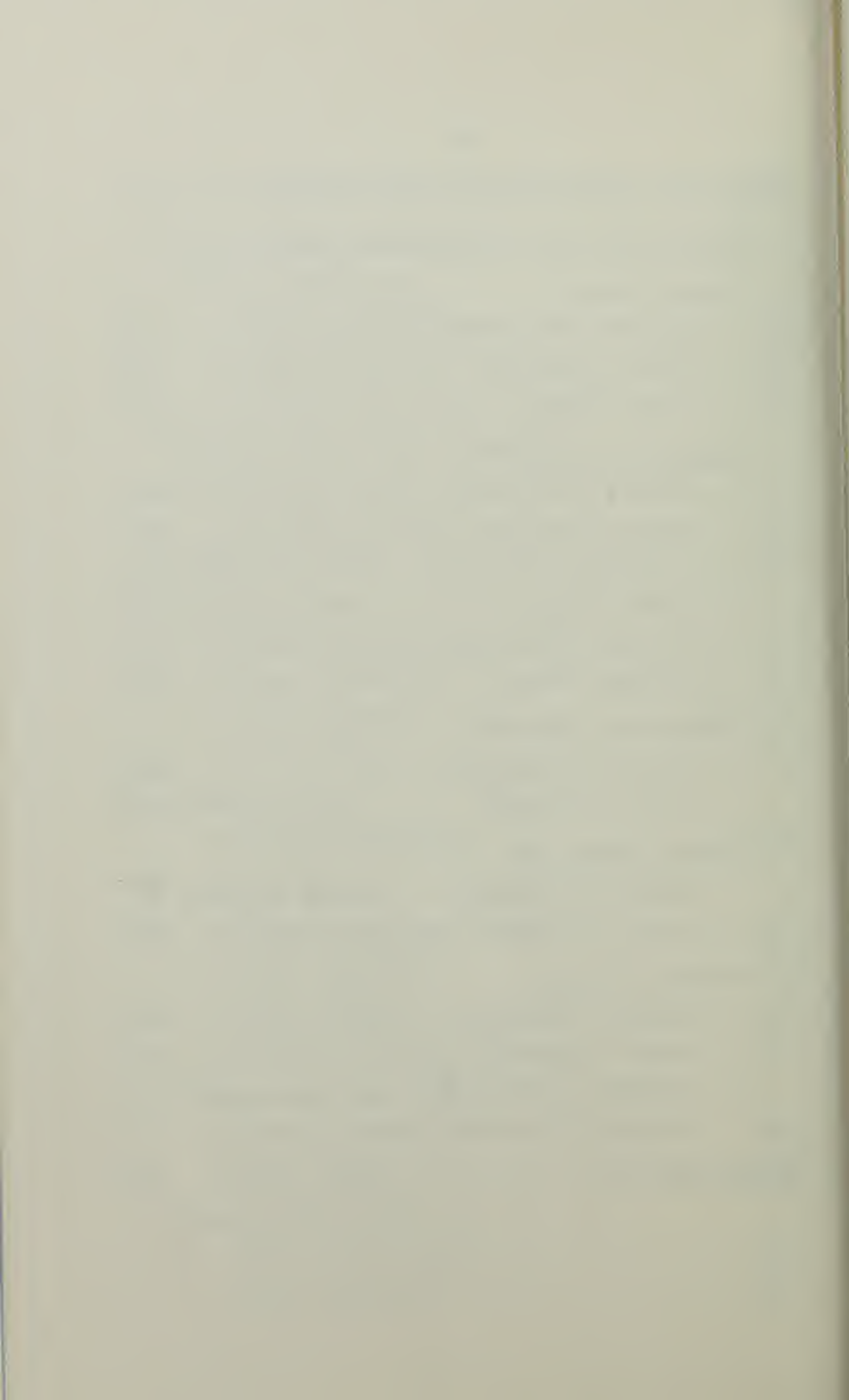
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NAMES AND ADDRESSES OF ATTORNEYS

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Anchorage, Alaska,
Attorney for Appellee.



In the District Court for the District
of Alaska, Third Division

Criminal No.

UNITED STATES OF AMERICA, Plaintiff,

vs.

JAMES BURTON ING, RAYMOND WRIGHT,
CHARLES E. SMITH, JOHN WALKER,
DEWEY TAYLOR and LEMUEL ASHLEY
WILLIAMS, Defendants.

INDICTMENT

Violation of Section 65-6-1, ACLA, 1949

The Grand Jury charges:

Count I.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware did wilfully, unlawfully and feloniously with intent to injure and defraud C. A. Peters, owner of the Fifth Avenue Cash Grocery, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 9078.

This check not good for more than sixty days. Contract 1787. August 22, 1956.

Period ended 8/19/56. Pay to the Order of Wendell R. Ware, Badge No. 1177. Gross Earnings 236.00. Deductions: WT&FICA 26.20, A.U.C. 1.18, Alaska I.T. 3.15, B and L 28.00. Amount of check 177.47. The sum of \$177 and 47 cts. Morrison-Knudsen Company, Inc. by Guy M. King.

The First National Bank of Anchorage, 59-6, Anchorage, Alaska.

Countersignature required for amounts over three hundred dollars.

By endorsement of this check the undersigned acknowledges payment in full of all his claims and demands against Morrison-Knudsen Company, Inc. on account of labor performed to and including the period stated on the face of this check. Signed Wendell R. Ware. Pay to the Order of Bank of Alaska-155-Anchorage, Alaska. Fifth Avenue Cash Grocery, C. A. Peters.

The said James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware well knowing at the time that the check was false and forged.

Count II.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware did wilfully, unlawfully, and feloniously with intent to injure and defraud the Kennedy Hardware, Incorporated, a corporation duly organized and incorporated in the Territory of Alaska, the owners of a

certain business enterprise, the Sport Shop, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 8941. Contract 1787. August 22, 1956.

Period ending 8/19/56. Pay to the Order of Wendell R. Ware, Badge No. 1177. Gross Earnings 236.00. Deductions: WT&FICA 26.20, A.U.C. 1.18, Alaska I.T. 3.15, B and L 28.00. Amount of Check 177.47. The sum of \$177 and 47 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: Wendell R. Ware. The Sport Shop, Box 1120, Anchorage, Alaska.

The said James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware well knowing at the time that the check was false and forged.

Count III.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware did wilfully, unlawfully and feloniously with intent to injure and defraud the Hub Clothing Company, Incorporated, a corporation duly organized and incorporated in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 8833. Contract 1787, August 22, 1956.

Period ended 8/19/56. Pay to the Order of Wendell R. Ware. Badge No. 1177. Gross Earnings 236.00. Deductions: WT&FICA 26.20, A.U.C. 1.18, Alaska I.T. 3.15, B and L 28.00. Amount of Check 177.47. The sum of \$177 and 47 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: Wendell R. Ware. Hub Clothing Co.

The said James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware well knowing at the time that the check was false and forged.

Count IV.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware did wilfully, unlawfully and feloniously with intent to injure and defraud the Union Club of Anchorage, Incorporated, a corporation duly organized and incorporated in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 8895. Contract 1787, August 22, 1956.

Period ended 8/19/56. Pay to the Order of Wen-

dell R. Ware. Badge No. 1177. Gross Earnings 236.00. Deductions: WT&FICA 26.20, A.U.C. 1.18, Alaska I.T. 3.15, B and L 28.00. Amount of Check 177.47. The sum of \$177 and 47 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: Wendell R. Ware. Bank Stamp: Union Club—Carlson. For deposit only.

The said James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware well knowing at the time that the check was false and forged.

Count V.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware did wilfully, unlawfully and feloniously with intent to injure and defraud Wallace Burnett and Helen Burnett, owners of The Club, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 8965. Contract 1787. August 29, 1956.

Period Ended 8/26/56. Pay to the Order of Wendell R. Ware. Badge No. 1177. Gross Earnings 280.00. Deductions: WT&FICA 39.39, A.U.C. 1.40, Alaska I.T. 3.55, B and L 28.00. Amount of Check

207.26. The sum of \$207 and 26 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: Wendell R. Ware. The Club. First National Bank of Anchorage. Helen Burnett.

The said James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware well knowing at the time that the check was false and forged.

Count VI.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown did wilfully, unlawfully and feloniously with intent to injure and defraud Dukal Enterprises, Incorporated, a corporation duly organized and incorporated in the Territory of Alaska, the owners of a certain business enterprise, the Hanover Gift Shop, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 9089. Contract 1787. August 22, 1956.

Period ended 8/19/56. Pay to the Order of Thomas A. Brown. Badge No. 7134. Gross Earnings 280.00. Deductions: WT&FICA 30.70, A.U.C. 1.40, Alaska I.T. 3.55, B and L 28.00. Amount of Check 216.35. The sum of \$216 and 35 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: Thomas A. Brown, Gen. Del. Anchorage. Deposit to Acct. of Dukal Enterprises Inc. CHK.

The said James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown well knowing at the time that the check was false and forged.

Count VII.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown did wilfully, unlawfully and feloniously with intent to injure and defraud John D. Harris, owner of the Anchorage Liquor Store, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 9005. Contract 1787. August 29, 1956.

Period ended 8/26/56. Pay to the Order of Thomas A. Brown. Badge No. 7134. Gross Earnings 280.00. Deductions: WT&FICA 30.70, A.U.C. 1.40, Alaska I.T. 3.55, B and L 28.00. Amount of Check 216.35. The sum of \$216 and 35 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: Thomas A. Brown, Gen. Del. Anchorage. Anchorage Liquor Store. John D. Harris.

The said James Burton Ing, Raymond Wright

and John Walker aka Thomas A. Brown well knowing at the time that the check was false and forged.

Count VIII.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown did wilfully, unlawfully and feloniously with intent to injure and defraud Wilma Jones and Cecil Jones, the owners of Hank's Hardware, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 9008. Contract 1787. August 22, 1956.

Period ended 8/19/56. Pay to the Order of Thomas A. Brown. Badge No. 7134. Gross Earnings 280.00. Deductions: WT&FICA 30.70, A.U.C. 1.40, Alaska I.T. 3.55, B and L 28.00. Amount of Check 216.35. The sum of \$216 and 35 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: Thomas A. Brown. Pay to the Order of Spenard Branch National Bank of Alaska of Anchorage. Hank's Hardware, For Deposit Only.

The said James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown well knowing at the time that the check was false and forged.

Count IX.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown did wilfully, unlawfully and feloniously with intent to injure and defraud C. T. Rewak, owner of Tom's Radio Service, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 9073. Contract 1787. August 22, 1956.

Period ended 8/19/56. Pay to the Order of Thomas A. Brown. Badge No. 7134. Gross Earnings 280.00. Deductions: WT&FICA 30.70, A.U.C. 1.40, Alaska I.T. 3.55, B and L 28.00. Amount of Check 216.35. The sum of \$216 and 35 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: Thomas A. Brown. For Deposit Only.
Tom's Radio Service, Anchorage, Alaska.

The said James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown well knowing at the time that the check was false and forged.

Count X.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond

Wright and John Walker aka Thomas A. Brown did wilfully, unlawfully and feloniously with intent to injure and defraud Robert W. Stratton, Jr., owner of Stratton's Gateway Service, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. (Illegible). Contract 1787. August 29, 1956.

Period Ended 8/26/56. Pay to the Order of Thomas A. Brown. Badge No. 7134. Gross Earnings 280.00. Deductions: WT&FICA 30.70, A.U.C. 1.40, Alaska I.T. 3.55, B and L 28.00. Amount of Check 216.35. The sum of \$216 and 35 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: Thomas A. Brown, Gen. Del. Anchorage. Pay to the Order of City National Bank of Anchorage, Anchorage, Alaska. For Deposit Only. Stratton's Gateway Service, Robert Stratton.

The said James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown well knowing at the time that the check was false and forged.

Count XI.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown did wilfully, unlawfully and feloniously with intent

to injure and defraud Roy McKay, owner of McKay's Hardware, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 9077. Contract 1787. August 29, 1956.

Period Ended 8/26/56. Pay to the Order of Thomas A. Brown. Badge No. 7134. Gross Earnings 280.00. Deductions: WT&FICA 30.70, A.U.C. 1.40, Alaska I.T. 3.55, B and L 28.00. Amount of Check 216.35. The sum of \$216 and 35 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: Thomas A. Brown. McKay's Hardware.

The said James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown well knowing at the time that the check was false and forged.

Count XII.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods, did wilfully, unlawfully and feloniously with intent to injure and defraud Thomas B. Waters, owner of the Frontier Loan Company, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 8903. Contract 1787. August 29, 1956.

Period ended 8/26/56. Pay to the Order of James C. Woods. Badge No. 6840. Gross Earnings 280.00. Deductions: WT&FICA 27.60, A.U.C. 1.40, Alaska I.T. 3.54, B and L 28.00. Amount of Check 219.46. The sum of \$219 and 46 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: James C. Woods. Initialed: F.E.G. 4/4/56, T.B.W.

The said James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods well knowing at the time that the check was false and forged.

Count XIII.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods did wilfully, unlawfully and feloniously with intent to injure and defraud Sonja Davis and Walter Davis, owners of the Davis Liquor Store, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 9012. Contract 1787. August 21, 1956.

Period Ended 8/19/56. Pay to the Order of James C. Woods. Badge No. 6840. Gross Earnings 280.00. Deductions: WT&FICA 27.60, A.U.C. 1.40, Alaska I.T. 3.54, B and L 28.00. Amount of Check 219.46. The sum of \$219 and 46 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: James C. Woods. Davis Liquor Store, 236 Fourth, Anchorage, Alaska. By Sonja Davis.

The said James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods well knowing at the time that the check was false and forged.

Count XIV.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods did wilfully, unlawfully and feloniously with intent to injure and defraud Robert J. Shimek and Violet D. Shimek, owners of the Record Shop, The Radio-TV Center, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 8973. Contract 1787. August 29, 1956.

Period Ended: 8/26/56. Pay to the Order of

James C. Woods. Badge No. 6840. Gross Earnings 280.00. Deductions: WT&FICA 27.60, A.U.C. 1.40, Alaska I.T. 3.54, B and L 28.00. Amount of Check 219.46. The sum of \$219 and 46 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: James C. Woods. For Deposit Only. The First National Bank, The Record Shop, The Radio-TV Center.

The said James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods well knowing at the time that the check was false and forged.

Count XV.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods did wilfully, unlawfully and feloniously with intent to injure and defraud George J. Cox and James La-Bounty, owners of the City Service, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 8977. Contract 1787. August 15, 1956.

Period ended 8/12/56. Pay to the Order of James C. Woods. Badge No. 6840. Gross Earnings 280.00. Deductions: WT&FICA 27.60, A.U.C.

1.40, Alaska I.T. 3.54, B and L 28.00. Amount of Check 219.46. The sum of \$219 and 46 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: James C. Woods. Pay to the Order of National Bank of Alaska in Anchorage, Anchorage, Alaska, City Service.

The said James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods well knowing at the time that the check was false and forged.

Count XVI.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods did wilfully, unlawfully and feloniously with intent to injure and defraud Benny Leonard and Mary Leonard, owners of Leonard's Varieties, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 9065. Contract 1787. August 29, 1956.

Period ended 8/26/56. Pay to the Order of James C. Woods. Badge No. 6840. Gross Earnings 280.00. Deductions: WT&FICA 27.60, A.U.C. 1.40, Alaska I.T. 3.54, B and L 28.00. Amount of Check 219.46. The sum of \$219 and 46 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: James C. Woods. NK 254-05-4726.
Leonard's Varieties, Box 2279, Anchorage, Alaska.

The said James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods well knowing at the time that the check was false and forged.

Count XVII.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods did wilfully, unlawfully and feloniously with intent to injure and defraud H. I. Stewart and Oro Stewart, owners of the Stewart's Photo Shop, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 9051. Contract 1787. August 29, 1956.

Period ended 8/26/56. Pay to the Order of James C. Woods. Badge No. 6840. Gross Earnings 280.00. Deductions: WT&FICA 27.60, A.U.C. 1.40, Alaska I.T. 3.54, B and L 28.00. Amount of Check 219.46. The sum of \$219 and 46 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: James C. Woods. Pay to the Order of The First National Bank, Anchorage, Alaska. For Deposit Only. Stewart's Photo Shop, Anchorage, Alaska.

The said James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods well knowing at the time that the check was false and forged.

Count XVIII.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods did wilfully, unlawfully and feloniously with intent to injure and defraud John D. Harris, owner of the Anchorage Liquor Store, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. (Illegible). Contract 1787. August 29, 1956.

Period Ended 8/26/56. Pay to the Order of James C. Woods. Badge No. 6840. Gross Earnings 280.00. Deductions: WT&FICA 27.60, A.U.C. 1.40, Alaska I.T. 3.54, B and L 28.00. Amount of Check 219.46. The sum of \$219 and 46 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: James C. Woods. Anchorage Liquor Store, John D. Harris.

The said James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods well knowing at the time that the check was false and forged.

Count XIX.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Lemuel Ashly Williams aka Theodore Williams did wilfully, unlawfully and feloniously with intent to injure and defraud John D. Harris, owner of the Anchorage Liquor Store, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 8927. Contract 1787. August 29, 1956.

Period Ended 8/26/56. Pay to the Order of Theodore Williams. Badge No. 6969. Gross Earnings 270.00. Deductions: WT&FICA 19.50, A.U.C. 1.35, Alaska I.T. 3.38, B and L 28.00. Amount of Check 217.87. The sum of \$217 and 87 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: Theodore Williams, 410 8th. Anchorage Liquor Store. John D. Harris.

The said James Burton Ing, Raymond Wright and Lemuel Ashly Williams aka Theodore Williams well knowing at the time that the check was false and forged.

Count XX.

On or about the 1st day of September, 1956, at or near Mile 113, Glenn Highway, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Lemuel Ashly Williams aka Theodore Williams did wilfully, unlawfully and

feloniously with intent to injure and defraud Gertrude Jurgeleit and Oscar Jurgeleit, owners of the Sheep Mountain Lodge, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc. General Contractors, Boise, Idaho. Pay Check No. 8924. Contract 1787. August 29, 1956.

Period Ended 8/26/56. Pay to the Order of Theodore Williams. Badge No. 6969. Gross Earnings 270.00. Deductions: WT&FICA 19.50, A.U.C. 1.35, Alaska I.T. 3.38, B and L 28.00. Amount of Check 217.87. The sum of \$217 and 87 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: Theodore Williams, 410 8th. Tues. Morning—6:30 A.M. Going to Valdez with (illegible) driver. Blk 53 Buick Sdn.

The said James Burton Ing, Raymond Wright and Lemuel Ashly Williams aka Theodore Williams well knowing at the time that the check was false and forged.

A True Bill.

/s/ HAROLD STRANDBERG,
Foreman.

/s/ WILLIAM T. PLUMMER,
United States Attorney.

Witnesses examined before the Grand Jury: T. E.

Pass, Dewey Taylor, Charles E. Smith, John Walker, Lemuel Williams, Raymond Wright, Virginia Shields, Carl R. Berlin, Henry Futor, Ivan S. Barton, Helen M. Burnett, Charles N. Knuth, John D. Harris, Mabel Rewak, George C. Wilmoth, Roy McKay, Thomas B. Waters, Darleen R. Ramussen, Benny L. Leonard, William J. Gordon, Jim LaBounty, Joseph Turgeon, Gertrude Jurgeleit, Roy B. Johnson, Jr., Russell Hobbs, Gladys Faye Berry.

United States of America,
Territory of Alaska,
Third Division—ss.

I, The Undersigned, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that this is a true and full copy of an original document on file in my office as such clerk.

Witnessed my hand and the Seal of said Court this 20th day of May, 1958.

[Seal]

WM. A. HILTON,

Clerk of the District Court.

s/ By JO ANN MYRES,
Deputy.

[Title of District Court and Cause.]

PLEA OF NOT GUILTY AND SETTING
TIME FOR TRIAL

(Charles E. Smith)
(Counts 1 through 5)

Before the Honorable J. L. McCarrey, Jr., District Judge.

Now on this 6th day of November, 1957, came Wm. T. Plummer, United States Attorney, came also the defendant Charles E. Smith in person, and represented by his counsel Buell Nesbett and said defendant having heretofore and on the 5th day of November, 1957, been duly arraigned, announced to the Court that he is ready to enter his plea herein, is asked by the Court if he is guilty or not guilty of the crime charged against him in the indictment, to wit: Uttering a forged instrument, to which defendant says he is not guilty and therefore puts himself upon the Country, and the United States Attorney, for and in behalf of the Government, does the same.

Whereupon, respective counsel consenting, the Court set this cause for trial at 10:00 o'clock A.M. of Monday, March 3, 1958.

Entered Journal No. J-55, Page No. 313, November 6, 1957.

[Title of District Court and Cause.]

VERDICT NO. 3

We, the jury, duly impaneled and sworn to try the above-entitled case, do find the defendant, Charles E. Smith, guilty of the crime charged in Count I of the indictment;

And we do further find the defendant not guilty of the crime charged in Count II of the indictment;

And we do further find the defendant guilty of the crime charged in Count III of the indictment;

And we do further find the defendant guilty of the crime charged in Count IV of the indictment;

And we do further find the defendant guilty of the crime charged in Count V of the indictment.

Dated at Anchorage, Alaska, this 28th day of Feb., 1958.

/s/ HADLEY H. SULLIVAN,
Foreman.

Entered Journal No. J-57, Page No. 391, Feb. 28, 1958.

[Endorsed]: Filed February 28, 1958.

United States District Court for the
District of Alaska, Third Division

No. CR 3772

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES EDWARD SMITH, Defendant.

JUDGMENT AND COMMITMENT

On this 3rd day of March, 1958, came the attorney for the government and the defendant appeared in person and by counsel, Buell A. Nesbett, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty of the offense of forgery in violation of Section 65-6-1 ACLA 1949 as charged in Counts I, III, IV, and V of the Indictment on file herein and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) years on each of Counts I, III, IV, and V, said sentence imposed on Counts

III, IV, and V to run concurrently with said sentence imposed on Count I, said sentence to commence and begin on the 3rd day of March, 1958.

It Is Adjudged that execution of Two (2) years of said sentence of imprisonment is hereby suspended on the condition that the defendant make full restitution on or before the 3rd day of September, 1958.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Done in open Court this 3rd day of March, 1958,
at Anchorage, Alaska.

/s/ J. L. McCARREY, JR.,
United States District Judge.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed March 3, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Appellant—Charles E. Smith, c/o Morrison-Knudsen Company, Fairbanks, Alaska.

Appellant's Attorney: Buell A. Nesbett, Suite 7, First National Bank Building, Anchorage, Alaska.

Offense: Uttering and publishing as true and genuine forged checks as listed in Counts 1, 3, 4

and 5 of the indictment herein pursuant to jury verdict dated February 28, 1958, with findings of "guilty" as to each of the Counts above mentioned, and sentence of this Court dated March 3, 1958, sentencing this Appellant to serve five years on each of counts 1, 3, 4 and 5 to run concurrently, two years of said sentence on each count to be suspended conditional on making restitution by September 3, 1958.

This Appellant has been at liberty on \$2,500 cash bail.

I, the above named Appellant, hereby appeal to the U. S. Court of Appeals for the Ninth Circuit from the above named judgment and sentence.

Dated at Anchorage, Alaska, this 3rd day of March, 1958.

/s/ CHARLES E. SMITH,
Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 3, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The following statement of points upon which the appellant Charles E. Smith intends to rely on appeal is submitted in accordance with Rule 75(d) Federal Rules of Civil Procedure and Rule 39 (b) (1) Federal Rules Criminal Procedure:

1. The trial Court erred in admitting the testimony of M. E. Dankworth, Territorial Police Officer, containing admissions made by Appellant while in custody without first holding a private hearing to determine whether the admissions had been voluntarily made. Such a hearing was denied.

2. The trial Court erred in admitting the testimony of M. E. Dankworth, Territorial Police Officer, containing admissions made by Appellant while still in the same custody and under the same pressures that existed when his confession was illegally obtained, the admissions containing the same information as the confession which was held to be inadmissible because taken before prompt arraignment, upon promises of leniency and during a time when appellant was prevented from seeing his attorney.

3. The trial Court erred in refusing to instruct the jury that the admissions of Appellant while in custody testified to by M. E. Dankworth, must have been voluntarily made.

4. That the trial Court erred in refusing to strike the testimony of the witness M. E. Dankworth pursuant to timely motion by appellant.

5. That the U. S. Attorney committed reversible error in commenting on the failure of the Appellant to take the witness stand and the trial Court erred in failing to properly instruct the jury after the U. S. Attorney's comments.

6. That the trial Court erred in refusing to per-

mit Appellant to inspect the confession taken from him prior to its attempted introduction into evidence during the course of the trial.

Dated at Anchorage, Alaska this 11th day of March, 1958.

/s/ BUELL A. NESBETT,
Attorney for Appellant,
Charles E. Smith.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 11, 1958.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Pursuant to Rule 39(b)(1) Federal Rules Criminal Procedure and Rule 75(a) Federal Rules Civil Procedure the following contents are designated by the appellant Charles E. Smith.

1. Reporter's transcript of the testimony of the witnesses: Virginia Shields, Henry Futor, Ivan Barton, Helen Burnett, Edward Harkabus, James H. Barkley, Earl Hibpschman, James Chenoweth, Stanley Laird, Charles E. Smith, M. E. Dankworth, Lois Bradley.

2. Reporter's transcript of all motions made by Attorney, Buell A. Nesbett on behalf of the appellant, Charles E. Smith, and arguments made concerning the motions by Appellant Smith's counsel or the Government and rulings by the Court.

3. All arguments made by any of counsel for the defense and Government concerning the admissibility of the testimony of Edward Harkabus, M. E. Dankworth or the Government's Exhibit 20 for identification and rulings.

4. Government's Exhibit 20 for identification.

5. Reporter's transcript of all proceedings concerning and the testimony of the defendant Charles E. Smith.

6. Government's Exhibit XXIII for identification.

7. Reporter's transcript of motion for acquittal Charles E. Smith and Court's ruling.

8. Motion to strike testimony of E. M. Dankworth, arguments thereon and ruling.

9. Motion to produce documents at commencement of trial and arguments and ruling thereon.

10. Reporter's transcript of U. S. Attorney's Closing Argument, last portion only.

Dated at Anchorage, Alaska, this 11th day of March, 1958.

/s/ BUELL A. NESBETT,
Attorney for Appellant,
Charles E. Smith.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 11, 1958.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, Wm. A. Hilton, Clerk of the above entitled court, do hereby certify that pursuant to Rule 10 (1) of the Rules of the United States Court of Appeals, Ninth Circuit, and Rules 75 (g) and 75 (o) of the Federal Rules of Civil Procedure, I am transmitting herewith the Original Papers in my office dealing with the above entitled action or proceeding, as designated by counsel for defendant-appellant, together with the following:

1. Indictment.
2. Plea.
3. Verdict.
4. Judgment.
5. Notice of Appeal.
6. Statement of Points.
7. Designation.

The papers herewith transmitted constitute the record on appeal to the United States Court of Appeals, Ninth Circuit, San Francisco, California, from Judgment filed and entered in the above entitled cause by the above entitled court on the 3rd day of March, 1958.

Dated at Anchorage, Alaska, this 21st day of May, 1958.

[Seal] /s/ WM. A. HILTON,
 Clerk.

In the District Court for the District
of Alaska, Third Division

Cr. No. 3772

UNITED STATES OF AMERICA, Plaintiff,

vs.

JAMES BURTON ING, RAYMOND WRIGHT,
CHARLES E. SMITH, JOHN WALKER,
DEWEY TAYLOR, and LEMUEL ASHLEY
WILLIAMS, Defendants.

TRANSCRIPT OF PROCEEDINGS

Before: The Honorable J. L. McCarrey, Jr.,
U. S. District Judge.

Anchorage, Alaska, February 18, 1958, 4:00
o'clock p.m.

Appearances: For the Plaintiff: William T. Plummer, United States Attorney, Federal Building, Anchorage, Alaska. For the Defendant Ing: Wendell P. Kay, Attorney at Law, 604 Fourth Avenue, Anchorage, Alaska. T. N. Gore, Attorney at Law, 320 Chena Building, Fairbanks, Alaska. For the Defendant Smith: Buell A. Nesbett, Attorney at Law, First National Bank Building, Anchorage, Alaska. [1]*

Proceedings

The Court: Counsel for the defendant Ing and

* Page numbers appearing at bottom of page of Reporter's Original Transcript of Record.

counsel for the defendant Smith have ex-parte filed certain motions in the case of United States of America, Plaintiff, vs. James Burton Ing, et al., Defendants, Criminal No. 3772. I presume counsel for the Government has had an opportunity to consider these motions in preparation for the argument?

Mr. Plummer: Yes, your Honor. I don't believe I have the—yes, I do, your Honor, and I had a chance to inspect them.

The Court: Now, could I ask your position, Mr. Plummer, as to the request of Charles E. Smith. Do you have any objection to him having a copy of his statement?

Mr. Plummer: Yes, your Honor. I resist that as well as the motion made by Mr. Ing.

The Court: Well, then the court will hear you in argument. You may proceed first, Mr. Kay, since you filed your motion first.

Mr. Kay: Thank you, your Honor. Your Honor, Mr. Plummer: Of course, our motion is for the inspection and the opportunity to copy this pre-trial statement made by the defendant Ing based upon the Federal Rules of Criminal Procedure, Rule 16, which similar provisions, and, in fact, unfortunately much stronger provisions exist in many of the state rules of procedure.

I want to be perfectly frank with the Court and say right off hand there have been several federal decisions which are cited [3] in Barron and Holtzoff which have held that the defendant under these circumstances did not have the right to require—

against the Government opposition that he be given an opportunity to inspect his pre-trial statement. I want to say at the same time that, in my opinion, the Court of Appeals for the Ninth Circuit has indicated in the case of *Monroe vs. United States* that if this same motion were to come before them that such a motion would be granted. I want to refer your Honor to the case of *Monroe vs. United States*, Court of Appeals for the Ninth Circuit, decided in 1946. The citation is 234 F 2d 49. Barron and Holtzoff cites that case in the supplement as follows: Under Rule 16, "In prosecution for conspiracy to bribe police officer and bribery itself could properly request pre-trial inspection of recordings of conversations between the police officer and defendants, and trial court in its discretion could have required pre-trial production of such recordings, but trial court did not abuse its discretion in denying such requests, where defendants had already been accorded opportunity by Government to inspect the recordings." In other words, the court said——

The Court: That is that case?

Mr. Kay: That is the *Monroe* case, yes, your Honor. The court said while in our opinion it is a matter of vast discretion of the trial judge and while we can't say that the trial judge abused his discretion in denying this request, he wouldn't have abused his discretion in granting it and he didn't abuse his [4] discretion in denying it where the Government had already afforded the defendant an opportunity to inspect and copy the document, and

so I think that clearly under the circumstances of that case, if no such opportunity had been afforded, already been afforded by the Government, that the Ninth Circuit would have, in my opinion, and I think if your Honor will examine the language of the opinion of the Ninth Circuit, you will find it would have held it abusive discretion under the circumstances where nothing substantial appears why the defendant should be denied that right; they would have held that abusive discretion to deny it.

Now, your Honor, I'd also like to cite—I want to say, of course, it isn't a Federal Rules of Civil Procedure citation, but it is a most influential and because of the language and reasoning of the Supreme Court of California in the case of *Powell vs. Superior Court of California*, 312 F. 2d 698—I mis-cited it in my memorandum as being page 701. It is not. It is page 698—the language of the court is, if I may be permitted, so reasonable, so cogent I'd like to quote just a paragraph of it.

The Court: Pardon me. It's hard for me to see how you can cite a civil case.

Mr. Kay: It's a criminal case, your Honor. What I am saying is, it is not under the Federal Rules of Criminal Procedure. It is under similar rule in California in the California State Court. "In the circumstances of the present case, to deny inspection of defendant's statements would likewise be to lose [5] sight of the objective of ascertainment of the facts, and would be out of harmony with the policy of this state that the criminal prosecutions is not to secure a conviction in every case

by any expedient means, however odious, but rather, only through establishing the truth upon a public trial fair to the defendant and state alike," and they go on to point out here the defendant has made a statement to deny him the opportunity to inspect it prior to trial for the purpose of refreshing his recollection as to what he said a year ago is ridiculous when you deny that right to no other witness in the case. Every other witness in the case, of course, is afforded — both for the Government and for the defense would be accorded the right to examine a statement and would probably have been furnished a copy of it at the time and would have had an opportunity to refresh his recollection by examining it. Why should there be any different ruling with regard to the defendant?

The Court: May I hear you on this other point, counsel, that is, you say there are some Supreme Court cases which have denied——

Mr. Kay: No. No Supreme Court cases, your Honor. There are other federal cases from other circuits which are cited in Barron and Holtzoff.

The Court: Which hold it cannot. Can you explain those away?

Mr. Kay: Well, all I can say is that they take one [6] view of Rule 16 and in my opinion the Court of Appeals for the Ninth Circuit takes a different and correct view. It is perfectly possible to interpret Rule 16 as they do by staying with the strict wording view of the language. The language is that a defendant can properly obtain for inspection and copy books, papers, documents or tangible

objects obtained from or belonging to the defendant. That is the language. You can obtain those designated books, papers, documents or tangible objects.

The Court: Pardon me. Did you consider that his statement was his own property?

Mr. Kay: I certainly would say that it is just as much his property as any other of these documents that could be obtained from him.

The Court: Well, aren't you stretching it a little bit when you state that because a person might have a wallet or a passport and those matters may have been obtained from the defendant through search warrant or otherwise, and I can well understand how the title to that would never pass to the Government, but now the statement is something different.

Mr. Kay: Suppose he has a letter in his possession that came from somebody else?

The Court: That is his.

Mr. Kay: Or other property not belonging to him, just happened to be in his possession at the time he was arrested and ceased and he wants to see that prior to trial? What I say, [7] your Honor, is that it takes a very strict view of that rule to say that a statement voluntarily given by a man in the presence of an officer of the law and immediately by them reduced to writing is not obtained from him, when, if he carried the same statement on a piece of paper in his pocket, it would be something obtained from him. I say they are both obtained from him and that he is equally entitled—

should be equally entitled to have the production required; however, I'd like to point out again this is almost completely a matter of discretion of the trial court itself, whether the trial court feels it would be fair or not to permit the defendant to examine the particular paper.

The cases that I referred to your Honor were not even Circuit Court opinions. They were two District Court opinions, 17 FRD 365 and one in 6 FRD 270 holding that under similar circumstances that production of the particular statement as having been in an oral form, neither tape recorded or reduced to writing, later would not be required. I think, however, I feel confident, your Honor, if you will examine the language of the Court of Appeals of the Ninth Circuit, the Monroe case, that you will agree that under the circumstances in this case the court would not be abusing its discretion; in fact, would be wisely using its discretion if Ing would be permitted to examine his pre-trial statement.

The Court: Mr. Nesbett, may I hear you at this time on this same point?

Mr. Nesbett: Your Honor, I appreciate my motion being [8] heard along with Mr. Kay. I only filed it a matter of minutes ago. I subscribe to the argument as cited by Mr. Kay. Briefly, I want to be heard on what I consider to be the fairness of the rule and that is this: Your Honor will note from the experience that your Honor has had on the bench with respect to these cases that when a man is arrested and questioned by officers he is under a certain pressure. The object of the officers, no doubt

it is their duty, is to get, if possible, a statement or a confession from the person accused. There are rules surrounding the conduct that must govern him in doing that and I have no quarrel at this time with that. But here is what I want to point out: The accused is under the constant pressure to give a statement. There is no question but what if the defendant or the accused said, "I will give a statement, but I want a copy of that to keep for my own files" the officer would say, "Why, of course, we will give it to you." But, your Honor, once they receive that statement it becomes sacred, it becomes something secret, it becomes something they want to put in their files and keep there and not disclose it or any part of it to the defendant himself, if he is later charged with a crime, until the day of the trial.

Your Honor, I submit that the whole theory of pleading and practice these days is to do away with surprises and your Honor very well knows that with the rules of discovery that would follow in civil practice. Why then, particularly in view of the wording of a rule as strong as Rule 16, should the Government be permitted [9] to maintain what might possibly be a surprise in store for the defendant as the trial day approaches?

Now here in this case we have reason to believe that the Government has a statement. I fully have reason to believe that Smith gave a statement. He doesn't have the faintest idea what was put in that statement.

The Court: Pardon me. Is there any doubt in your mind that he gave a statement?

Mr. Nesbett: Well, he believes that he did. I have said so in the affidavit.

The Court: But did he sign a statement?

Mr. Nesbett: He says he signed a statement or something that he believes to be a statement. As a matter of fact, your Honor, he believes that the statement said, "This statement can't be used against me", and that Harkabus wrote it out in his handwriting. That surprises me. It puzzles me. I don't know what to think and the trial commences tomorrow morning. I'd like to see that statement if there is such a statement. Mr. Plummer certainly could clear that up in his argument.

The Court: Of course, you surprise the court by saying there is a doubt in your mind there was a statement given.

Mr. Nesbett: All I know is what I am told, your Honor, by the defendant as to what occurred in the Seattle jail over a year ago under circumstances of pressure as pointed out. If there is no statement, fine, but I do believe there is. I have [10] every reason to believe there is.

Now, your Honor, why, in all fairness shouldn't the defendant be allowed to see what is in that statement that he signed his name to a year ago now? Why is it so sacred? Why should it be kept secret in the Government files to be brought out only at the time of the trial? I can't see it. In all fairness and in view of the strong wording of Rule 16 and the authority cited by Mr. Kay it just isn't fair. It isn't in line with what we would call a rule of fairness in our criminal practice. We have broad

liberal rules of discovery in civil procedure. Why then should something like this be permitted in criminal procedure where the rights of the defendant are being protected? This is his own statement. He would only like to see it before he goes to trial. But, no, it won't be divulged until they get ready to divulge it. Your Honor, that isn't fair.

That is all I have to say on it.

The Court: Now, Mr. Kay, I'd like to hear you on your other motion, that is, for separate trial.

Mr. Kay: May I add one point on the motion I have just argued, your Honor, and that is this: That if your Honor will read Sections 2031 and 2032 of Barron and Holtzoff you will find the learned authorities of this treatise, one of whom I believe is now on the Federal Bench, are fully in accord with the belief and believe that the rules should extend to exactly what we have requested in this case. Now, to comment on the unfairness [11] of the narrowness of the interpretation of the rule that has occurred in several of the district courts. I want to say that the authors are one hundred percent—if they were here they would be joining in the argument for the defense. All you have to do is examine the paragraph to see the way they feel about it.

Now, as to the motion for separate trial.

* * * * *

The Court: Very well. Mr. Plummer. Would you restrain yourself to the question of inspection and/or photographing of the statements of the two

defendants before proceeding to the other subject, please.

Mr. Plummer: Yes, your Honor.

Mr. Kay advised the court about Section 2301 of Barron and Holtzoff which is found, I believe, on page 125 in Volume 4. It goes on for most of the paragraph telling what the advisory committee made in their early stages, but then if you will read the last sentence it says, "But, nevertheless, the committee in its final draft struck all reference to matter not privileged and restricted discovery in behalf of the defendant as heretofore indicated," which is the statement given in the first couple of sentences of the paragraph of 2301. So no matter what they feel that the law should be, there is no doubt in their minds about what the law is and what the law is is what the cases say it is under there—under the motion.

I call your Honor's attention to Rule 16. It provides for [12] documents or tangible objects obtained from or belonged to the defendant or obtained from others by seizure of process.

The Court: Now, what have you to say on the question I asked Mr. Kay? Do you consider that a statement made by a witness or a defendant the property of that defendant and/or witness?

Mr. Plummer: Absolutely not and neither do the cases. The cases without fail hold that a statement taken from a defendant is not his property. I will cite just a few to your Honor. *United States vs. Kiamie*, 18 FRD 421, which in that particular case, on the particular facts of reason, was that the state-

ment taken from the defendant were not objects or anything belonging to him. This is the rational of a whole line of cases. *United States vs. Louie Gim Hall*, 18 FRD 384. There is a very learned discussion of the early decisions under the Federal Rule 16 in *United States vs. Peltz*, very thorough discussion. That is found at 18 FRD 394. There is also a very complete discussion in *Shores vs. United States*, 174 F. 2d 838. And in all cases, without qualification, they hold that the statement taken from the defendant is not within the purview of Rule 16.

This California case that Mr. Kay cites——

The Court: Pardon me. That last one is 174 F. 2d 83——

Mr. Plummer: 8. One of the early cases under Rule 16 and it has a very complete discussion of the case and I think it goes on for about two pages there on this particular point, your [13] Honor; very good discussion. They hold in there, of course, that the defendant is not entitled to inspect.

To get back to Mr. Kay's point about this California case. Of course, the difficulty is that this is not being brought under California law. The motion is filed under Rule 16 and the facts are somewhat different even in the case that Mr. Kay has mentioned and in the present case. In the California case, in the *Powell* case, one of the difficulties was that, supposedly that the defendant couldn't remember what he said to tell the attorneys what was said. In this particular case Mr. Kay and Mr. Gore

were in the room right at the time that the statement was given.

The Court: Now, that is as to Mr. Ing. How about as to Mr. Smith?

Mr. Plummer: I am sure Mr. Nesbett was not even employed at that time but it wouldn't make any difference. I am merely distinguishing the California case from the present facts even though it has no application because it was not decided under Rule 16, and there is just a host of authority, your Honor, with very few authority to the contrary, that a statement taken from a defendant is not his property within the phraseology and the meaning and the understanding of Rule 16 of the Federal Rules of Criminal Procedure.

The Court: All right. Now, I have your argument on that point. Could we get then to your position as to Mr. Nesbett's principal point, that is, of fairness to the [14] defendant.

Mr. Plummer: Well, I believe, your Honor, that we are bound not by a spirit of fairness but what the law is as interpreted by the courts and although it's a very convincing approach the advisory committee that made the federal rules apparently did not feel that it was proper that they should do so and I think it has no application. It might be that I might think that they shouldn't even charge people for forgery, but that is my own opinion. I might think maybe it would be fair to let them go, but what I think and what the law is is entirely separate and apart, and, certainly, a feeling of fair play would not entitle the court, would not entitle

me—it would not even entitle me to give something to the defendant that I am bound by law not to give to him. If he wants to see the statement, of course, if he takes the stand in his own defense before he can be questioned from the statement, if in fact he is questioned from the statement, it has to be shown to him. He has a chance to read it and at that time only when he is on the stand would there be any fairness or unfairness in refusing to give him the statement. It just has nothing to do with the problem.

The Court: Now, do you have any law to support your position on that point?

Mr. Plummer: I think that Mr. Nesbett would be very prone, or would be very hard put to have any law to support his position, and the cases that I have read, and I have read numerous [15] cases on the subject, I have never seen a decision except possibly the California decision cited by Mr. Kay in his brief that talks about whether the decision turns on a question of fairness, and it is not a matter of fairness. It is a matter of law. There are a host of decisions, your Honor, that say it is not what we think the law should be, but it is what the law is and the law is that he is not entitled to it. There are a host of cases starting from the very first of the Federal Rules Decisions clear on down and you can go from the Shores case on down from it and there are just numerous, numerous cases holding that it is not the law and the Government cannot be required to do it.

The Court: Now, may I hear you on the motion

of Mr. Kay then, which is again renewed, for separate trial.

* * * * *

The Court: Very well. Do you wish to reply, Mr. Kay?

Mr. Kay: Very briefly, your Honor. On the first point, your Honor, relating to the motion for inspection. Mr. Plummer cites this host of cases and I have examined that host of cases and it amounts to about four decisions of District Courts, not Circuit Courts of Appeals, in almost every case. Each of those, your Honor, as Mr. Plummer has carefully pointed out, does not discuss the question of fairness, possibly because it was not argued because there is no answer to the question of fairness. It is obviously fair as Barren and Holtzoff point out that a man [16] should be allowed prior to trial, as is the right of every other witness, to inspect his own statement made the year previously, so there can't be any argument on that point. The whole argument that they go off on is the argument that Mr. Plummer has asserted here. It is not his property, that a statement taken from him is not his property. Well, I'd like to point out and point out very emphatically that that isn't what the rule says. It doesn't have to be his property for him to demand a right to inspect it. All it has to be is the property or a thing taken from him, obtained from him, or belonging to him or—the word “or” is there.

The Court: In the disjunctive?

Mr. Kay: Very true, your Honor. It is in the

disjunctive and the cases cited emphasize and ignore the emphasis of the words "not belonging to him, not something he owned or possessed at the time that it was taken orally and transcribed". They ignore the rule it was taken from him, obtained from him, and how they can get away from the language that a statement taken down by a reporter in shorthand is obtained from him, I don't know, and I believe if your Honor will examine the language of the Monroe case you will agree.

The Court: Counsel, may I just for your information read a portion of a case that has been handed to me by the Law Clerk. This is the case of *United States vs. Black*. You may have read it. It has just been handed to me. 6 FRD 270. Reading from Paragraph 2, 3 here is what the judge stated in writing that [17] decision, and I quote:

"As I construe Rule 16, it embraces only those documents and objects which were in existence and in the custody of a defendant or other person prior to the government's obtainment of them by process or seizure. It follows that any statements made to government agents after the commission of the alleged crime are excluded from inspection under the rule. This construction is substantiated by the notes of the Advisory Committee which are to the effect that the theory underlying Rule 16 is that the government must not be allowed to keep in its exclusive possession evidentiary matter which but for its impounding by the government would probably have been accessible to the defendant."

Mr. Kay: I know. I have read the language of

the Black case. That is the language of the District Court of Indiana, and, of course, the judge is entitled to his opinion, but I think, your Honor, that it would certainly be within the wise discretion of this court to disagree with that judge because if you will read Rule 16 you will discover there isn't a word in that case that it has to be a tangible object in existence, physical existence prior to the obtaining of it from the defendant. All it has to be is a book, paper, document, or tangible object in the disjunctive, or tangible object obtained from the defendant. [18]

Now, the court could just as well say, and I think your Honor would have to agree, that a statement I dictate to a stenographer sitting here and she transcribes it on a piece of paper is a paper obtained from me. It is a paper obtained from me and there is nothing in the rule that that paper has to be in existence prior to the time — of course, it wasn't in existence until it was obtained from the defendant, but it springs into existence immediately.

The Court: May I inquire, have you shepardized this Black case?

Mr. Kay: As far as I am aware — I have not, your Honor. As far as I am aware it was not taken up on appeal, at least on that point. It is not cited anywhere after that.

The Court: I wonder if there are any other cases that refer to the Black case, and I don't suppose you, Mr. Yates, know that, do you?

Mr. Yates: No, sir.

Mr. Kay: I can't recall whether the Monroe case that I cited cites the Black case or not, your Honor.

The Court: This is a 1946 case?

Mr. Kay: Yes, it is. There is one other point that I'd like to bring out on this subject, your Honor, and that is that Mr. Plummer referred to the fact that both Mr. Gore and I were present at the time that Mr. Ing made this statement. I don't know how that enters into it in any way—of course, there isn't [19] any provision that that would restrict the operation of this rule to things taken from a person only when certain persons were not there; but I will say this, that my memory and Mr. Gore's memory with regard to the details of that statement are probably less, much less acute than is the memory of the defendant Ing. I certainly can't recall the details of what was said excepting in a very general way, neither can Mr. Gore, and neither can Mr. Ing, and I think that, as Mr. Nesbett so ably pointed out, the whole spirit of fairness and as Barren and Holtzoff points out, and the Court of Appeals in the Monroe case calls to the wide exercise of the court's discretion giving us a chance the night before the trial to look at the document.

The Court: I wish counsel would have brought this up before since this is the first time this problem has ever been presented to this court.

Mr. Kay: I agree with you, your Honor.

The Court: I will have little time in which to consider your authorities or your argument. On the other point, that of separate trials, the court has gone into that quite thoroughly on a prior occasion

and at this time I deny that motion based upon what you have submitted to me; further, in respect thereto, as Mr. Plummer pointed out, it is a common occurrence that co-defendants oftentimes endeavor to place the blame on the other defendant and the mere fact they do attempt to do that is not grounds ipso facto to justify a separate trial. [20]

Mr. Kay: It is up to the discretion of the court.

The Court: Yes. Now, as to the other point, the court will have to reserve decision on it. Did you wish to be heard further, Mr. Nesbett?

Mr. Nesbett: I believe not only to point out that I certainly was not present at the time Mr. Smith's statement was taken, as long as we are going outside the record a little bit in this matter. It was taken in Seattle long before his arraignment and under circumstances of pressure, as I pointed out.

The Court: Yes. Mr. Plummer indicated that he thought the statement may have been made prior to the time you ever came into the case.

Unfortunately, I will have to reserve decision and search those authorities tonight because this is something, of course, of paramount importance and I think it will have far reaching effect upon criminal cases. Therefore, the court must consider it with such time as I have in respect thereto. [21]

February 19, 1958, 9:00 o'clock a.m.

Proceedings

The Court: The court at this time, in the case of United States of America, Plaintiff, vs. James Burton Ing, et al., Defendants, Criminal No. 3772, ren-

ders its oral opinion upon a motion made by counsel for the defendant Smith through Mr. Nesbett, and defendant Ing through Mr. Kay, wherein they request that statements made by their respective clients be made available to the counsel and the defendants prior to the trial of the case.

Argument of counsel directed itself principally to that of fair play, although other facets of the law was considered. The court feels that it is bound by the law which appears to be rather clear, and that is, that the defendant is not entitled to see the statement or statements that he may have made prior to the trial, and, further, that the defendant is not entitled to a confession that he may have made prior to the trial. A hurried, but unfortunately only cursory research of the law, which is all the time the court had to consider this matter, since this was submitted to the court yesterday afternoon at about 4:15 for consideration, reveals that the committee in the preparation of Rule 16 considered that aspect of Rule 16 to a certain extent but it has been ruled upon by a number of outstanding courts in the United States and it is a general law that while the court may grant the right to have the defendant see the statement and/or confession prior to the trial, courts have [23] repeatedly refused to grant this right and one of the strongest arguments that courts have used in denying this right is that, "How can a statement and/or confession which facts are known to the defendant, and, therefore, known to the defendant's counsel help to prepare for the defense of the defendant?"

For this reason and other reasons based upon the generally settled law, the motion for the opportunity to photograph and/or read the statements made by these defendants is hereby denied.

Now, I wouldn't want the Government to feel that in the event these statements may in the course of trial become necessary to be used that the defendants would not be entitled to a recess to consider these statements before being examined on the same. That is a matter that the court will determine at a later date, and would the Clerk of the Court please advise counsel forthwith of this ruling so that they will know. [24]

February 19, 1958, 10:00 o'clock a.m.

Proceedings

* * * * *

The Court: Very well. Mr. Plummer, you may make your opening statement at this time.

Mr. Plummer: * * *. Now, there are only 20 counts in this indictment. You will hear from the witness stand, there will be proof offered to show that the size of the plot, the size of the operation was much in excess of that. Some of the individuals passed as many as 25 or 30 checks. Some of the individuals passed 10 or 15, so that the entire scope of the operation was much larger than the 20 counts that you will find in the indictment that you have to consider.

Mr. Kay: Your Honor, I must interrupt Mr. Plummer by offering objection at this time by mention of any supposed or alleged crime outside the

scope of the indictment. I think it is highly improper for Mr. Plummer to attempt to refer at this time to the passing of other checks either prior or subsequent to the passing of the checks on this occasion and I object to it.

The Court: Well, is it your position, counsel, that the evidence will reveal more checks than——

Mr. Plummer: Yes. It is my position, your Honor, the people from that witness stand under oath will say that they passed—they might be charged with four or five counts in the indictment or probably two or three counts in this indictment—they will under oath from that witness stand say that they [27] probably passed 20 checks or maybe 25 checks.

The Court: The objection is overruled. You may proceed.

Mr. Plummer: * * *. In addition to their instructions they were given definite percentages that they were supposed to work on. The percentages, as I understand it, varied between the different passers; usually it was on a 25 percent basis, sometimes it was on a 50 percent basis of the money that they defrauded people out of. They got these false and forged checks, they got a portion of that money prorated just like doing any other kind of work. As I said before, the scheme went surprisingly well. There was no detection here during the early stages because the banks were closed. The checks, of course, were not presented for payment and would not be at the bank until Tuesday morning, but in the meantime the same or similar operation with

the same type of checks was going on up in Fairbanks. The people up there——

Mr. Kay: Again I must object, your Honor, to the United States Attorney referring to — apparently he is going to offer proof of separate crimes other than those contained in the indictment of which none of these persons have been convicted and I know of no basis in law by which he can refer to these alleged separate crimes that he must be obviously attempting to influence the jury. I think it is highly improper. I object to it on behalf of the defendant Ing.

Mr. Plummer: May I be heard? [28]

The Court: Yes.

Mr. Kay: If there is going to be argument I think it should be out of the presence of the jury.

The Court: Very well. Please come to the bench.

(Whereupon, counsel for the plaintiff and counsel for the defendants approached the bench and the following proceedings were had out of the hearing of the jury:)

The Court: Mr. Plummer.

Mr. Plummer: I am going to base my remarks, your Honor, not on the law. I think after I explain what I am going to do there will be no question as to the law. There is going to be testimony from this witness stand that they had planned to go back at one time, that during the operation here they received word from Fairbanks that the people up at Fairbanks had been busted, that as soon as they received that they got in their car and headed back for Fairbanks.

Mr. Kay: What this amounts to, if I may point out to the court, is an attempt to bring before the jury allegations or proof of separate crimes committed in Fairbanks and apparently other crimes committed here other than those set forth in the indictment. Apparently a large number of these crimes are going to be set forth and it seems to me that obviously is outside the proper scope of any statement that can be made at this time. As I understand the law, the only proof that may be made of a [29] conviction of a crime is for the purpose of impeachment and not a mere offer or mere statement concerning the fact that the defendant has committed a large number of other similar crimes. I think it is precisely the same error Mr. Dugger committed in the Leonard case except we don't have a blackboard here with 84 separate crimes set out on it, but I am convinced it is absolutely improper, your Honor, and I object to it.

Mr. Plummer: My position, your Honor, is that certainly a witness can be asked if he knows why he left along with anybody else that might have been with him, left Anchorage at a certain time and if he knows he can answer that question.

The Court: Mr. Kay, do you take the position that the Government is not in a position to prove the *modus operandi*?

Mr. Kay: No proof of *modus operandi*, your Honor. He is not making that argument. He is alleging separate crimes were committed in Fairbanks, Alaska, by these defendants, at least by the

defendant Ing, as I understand it, for which Ing has never been accused let alone tried or convicted.

The Court: Well, Mr. Plummer, the court would take the position that you would be limited to the proof as set forth in the indictment and not permitted to go forth and prove other matters that are not set forth in the indictment. I understood in your opening statement that you were referring to more or less the *modus operandi* rather than to other crimes because it would be highly improper to prove other crimes excepting in conformance [30] with the rules of the court, that is, whether or not they have ever been convicted of any other crime.

Mr. Plummer: I had no intention of doing so. If I appeared to have done so I apologize to counsel but I had no intention of doing that.

Mr. Kay: I ask the jury be withdrawn and a mistrial declared.

Mr. Plummer: I don't believe I did do it. I think Mr. Kay is imagining.

Mr. Kay: I will refer to the record.

Mr. Plummer: All right, refer to the record.

(Thereupon, the Court Reporter read Lines 3 through 16, page 28.)

Mr. Plummer: May I remark, I did not accuse these defendants even remotely of doing that up in Fairbanks.

Mr. Kay: Well, the inference is clear. The same operation was going on in Fairbanks he said.

Mr. Plummer: I said the same type of checks.

The Court: Decision is reserved. I would ask

counsel to be very careful not to refer to other crimes excepting in the manner permitted under the rules.

Mr. Plummer: Yes, sir.

The Court: And, as I stated before, I understood your first objection was that you would not think the Government was entitled to put on proof of *modus operandi*. I thought that [31] was improperly objected to. That is upon the basis I ruled at that time, but I sustain your objection reference to any additional crimes.

Mr. Hepp: While we are assembled here I'd like to take up another matter in connection with objections.

The Court: All right.

Mr. Hepp: It is very awkward for counsel to race each other to the floor to voice an objection. Very often I presume that the objection will be identical and it sounds rather ridiculous or silly for the second and then the third counsel to mimic the first. I would like to ask the court's attitude concerning applying the objection of any counsel as it may be appropriate to all three of the defendants, thereby eliminating the need for each singularly jumping to our feet and mimicking the one just before.

The Court: What is the attitude of other counsel in respect to this problem?

Mr. Nesbett: Naturally I would want to join in for my defendant, Mr. Smith.

Mr. Kay: As I understand it, if one of the counsel for the defense makes an objection it is

understood that that same objection goes for the other counsel?

The Court: That is the request.

Mr. Kay: That is satisfactory. It is all right with me.

The Court: What is your position, Mr. Plummer? [32]

Mr. Plummer: It makes no difference to me.

Mr. Kay: It saves three of us jumping up.

The Court: That is true, but since you brought up the subject I'd like to get counsels thinking on the question of cross examination. Now, each counsel has a right to cross examine fully. On the other hand, it has been my experience and I am sure counsels experience that it would be improper to let each counsel go over the same field and the same groundwork as that has been covered by the other counsel. So I would request counsel not to try to duplicate the same field that has been covered by other counsel.

Mr. Kay: One counsel might, however, have an additional point or thought along the same line that he might want to bring out.

The Court: That would be perfectly acceptable as far as the court is concerned.

Mr. Kay: No sense in overlapping one another.

Mr. Nesbett: Your Honor, I want to mention one thing here in connection with Mr. Kay's objection to some of the remarks Mr. Plummer made. I have never known Mr. Plummer to be anything but in good faith. But there is this much about it, we all know that at the conclusion of his case

if he hasn't proved everything that he offered to in his opening statement we can necessarily move for judgment of acquittal, but if he has proved, say, the elements of the indictment, that is it. Now, I hope that he is [33] in good faith in stating that he hopes and intends to prove this broad scope of giving the jury the impression this is a huge ring these fellows are a part of, if not the moving force inside it. That can be highly prejudicial if he makes such statements knowing that he has not got the witnesses to actually back it up to the extent that he intends and promises. That is the thought that occurred to me at the time he was making the statement. I only mention that in passing in support of Mr. Kay's argument.

The Court: Yes. I think I have made myself clear. The only thing remaining to be determined by the court is Mr. Kay's motion which the court has reserved decision on.

Mr. Kay: Very well, your Honor.

Mr. Plummer: I will advise counsel that I did make the statement in good faith and I think I do have the witnesses to corroborate it.

The Court: Very well.

(Thereupon, the discussion completed, counsel for the plaintiff and counsel for the defendants resumed their seats and the following proceedings were had in the presence of the jury:)

The Court: Now, Mr. Plummer, you may proceed. [34]

* * * * *

February 20, 1958, 10:00 O'Clock A.M.
Proceedings

* * * * *

The Court: You may call your next witness.

Mr. Plummer: I request that the bailiff call Mrs. Virginia Shields. She is back in the jury room.

VIRGINIA SHIELDS

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

The Court: You may proceed, counsel.

Q. (By Mr. Plummer): Would you please state your name? A. Virginia Shields.

Q. And what was your occupation during the Labor Day week-end of 1956?

A. Clerk in the Fifth Avenue Grocery and Liquor Store.

Q. That is here in the City of Anchorage?

A. Yes, it is.

Q. Who was the proprietor of the Fifth Avenue Cash Grocery at that time? A. Mrs. Peters.

Q. And you worked for her, is that correct?

A. I did, yes.

Q. Now, do you know any of the defendants in this case? [37] A. No, I don't.

Q. Did you have occasion during your employment to accept—I will withdraw that question and ask that this be marked for identification as Plaintiff's Exhibit No. 8, I believe it is. (The document was so marked.)

(Testimony of Virginia Shields.)

Mr. Plummer: May I approach the witness, your Honor.

The Court: You may.

Mr. Hepp: I object to any questions being put unless I have had an opportunity to examine the identification.

The Court: Very well, you may show it to counsel.

(The document was handed to defense counsel and thereafter returned to Mr. Plummer.)

Mr. Plummer: May I now approach the witness, your Honor.

The Court: You may.

Q. (By Mr. Plummer): Mrs. Shields, I hand you what has been marked for identification only as Plaintiff's Exhibit No. 8. Would you look at it carefully and tell me what it is?

A. It's a check I took in on the Labor Day weekend, Saturday afternoon I believe.

Q. And would you tell me what kind of a check it is and, if you will, the serial number from the check on the front?

A. Morrison-Knudsen 9078.

Q. Who is it made payable to? [38]

A. Wendell R. Ware.

Q. Now, will you look at the back of the check and is there an endorsement on there?

A. Wendell R. Ware.

Q. And was that written in your presence?

A. Yes, it was.

Q. And can you tell us, Mrs. Shields, or can

(Testimony of Virginia Shields.)

you point out to the court and jury the man that wrote that if he is in the court?

A. Third man over, first row, right side.

Q. Is that this gentleman in the blue suit?

A. Yes, it is.

Q. And if his name is Charles E. Smith then your answer is Charles E. Smith? A. Yes.

Q. Thank you. Now, do you remember anything about the purchase this gentleman made from you at the time he cashed the check, if in fact he made a purchase?

A. Yes, he made a purchase of whiskey, I believe it was.

Q. And did you give him the whiskey?

A. Yes, and also the change.

Q. And what is the check made out for?

A. \$177.74.

Q. And you took out for the whiskey and gave him the balance? A. Yes. [39]

Q. Do you recall whether or not, Mrs. Shields, you required any identification from this witness at the time he offered you the check?

A. Yes, he showed me identification.

Q. Do you recall what kind of identification it was?

A. Well, I am not sure whether it was a driver's license or what, but a little card with his picture.

Q. It did—— A. To the left.

Q. It did have a picture on it? A. Yes.

Q. Is the picture of the same gentleman or the same likeness as this gentleman sitting here?

(Testimony of Virginia Shields.)

A. Yes.

Q. Now, I wonder if you would look at the reverse side of the check again and see whether or not it carries a bank perforation on it? A. Yes.

Q. Can you tell me whether or not your company, the Fifth Avenue Grocery, realized any cash from this check?

A. Would you state that again, please?

Q. Did the company for which you worked at that time, the Fifth Avenue Grocery, realize any money from this check? A. No.

Q. And would you tell me why, if you know?

A. Well, she didn't put it through the bank. One of the policemen picked it up, picked the check up.

Q. And why did they pick it up, if you know?

A. She called up the Police Department and asked them if the M-K checks were good. He said no, he would be down to pick it up.

Mr. Plummer: I have no further questions.

The Court: You may cross examine then, Mr. Nesbett.

Cross Examination

Mr. Plummer: I am sorry, your Honor. I apologize to Mr. Nesbett. I, at this time, ask leave of the court to approach the witness and I'd like to offer that in evidence.

The Court: Is there any objection? Counsel have had a chance to see it.

Mr. Nesbett: I'd like to see it again, your Honor.

(Testimony of Virginia Shields.)

The Court: Very well. You may hand it to counsel again.

(Thereupon, the document was handed to defense counsel.)

The Court: Mr. Plummer, could you refer to the count?

Mr. Plummer: I am sorry, your Honor. That is check No.——

The Court: 9078. [41]

Mr. Plummer: 9078 and it is mentioned in Count I of the indictment.

The Court: Thank you.

Mr. Nesbett: Your Honor, may I confer with Mr. Plummer a moment about this?

The Court: Yes.

Mr. Nesbett: I have no objection, your Honor, to this check going into evidence.

The Court: Without objection then it may be admitted and marked Government's Exhibit No. 8.

Mr. Plummer: There is one alteration that Mr. Nesbett wanted to make on the check. I told him I had no objection. We probably better have the in-court deputy make the alteration since it has been marked for identification.

The Court: Very well. Do you wish to state in the record what that is?

Mr. Nesbett: Extraneous marking stamps on the check, your Honor.

The Court: Is it on the instrument itself or is it on the container?

(Testimony of Virginia Shields.)

Mr. Plummer: I think it is loose within the container, your Honor. May we approach the bench.

(Thereupon, Mr. Plummer and Mr. Nesbett approached the bench, without the reporter. After discussion the following proceedings were had:) [42]

The Court: Mrs. Dome, will you please remove that white slip?

Deputy Clerk: Yes, your Honor, I did.

The Court: Mr. Plummer, is there any need to retain this slip?

Mr. Plummer: I would think not, your Honor, but——

The Court: It has identification——

Mr. Plummer: To make sure I will, if I may, take it back to my files.

The Court: Without objection. Now, you may proceed, Mr. Nesbett.

Q. (By Mr. Nesbett): Now, Mrs. Shields, about what time of the day did you receive this check?

A. It was in the afternoon.

Q. And that was Saturday afternoon, was it?

A. I believe so.

Q. You believe so? A. Uh-huh.

Q. Well, don't you know?

A. Well, it could have been Friday or Saturday afternoon, one or the other days.

Q. You have refreshed your recollection in connection with the facts before coming here into court, haven't you?

A. No, I haven't thought much about it. [43]

(Testimony of Virginia Shields.)

Q. You haven't thought much about it?

A. No, I haven't.

Q. Well, you have discussed the case surely with Mr. Plummer before coming in to be a witness?

A. Well, I don't know if I discussed it with him, no.

Q. You didn't. You don't know whether you did or not?

A. No, I wouldn't say I discussed it with him.

Q. Well, did you or didn't you?

A. Well, no.

Q. You did not. Now, it was either a Friday or a Saturday as near as you can recall?

A. Either Friday or Saturday. I don't recall which day.

Q. That was the Labor Day week-end?

A. Yes.

Q. Was it rather a busy time?

A. No, we weren't busy.

Q. Is your store located in that Piggly Wiggly arrangement on Fifth Avenue?

A. No, it isn't.

Q. Where is it located?

A. 603 East Fifth Avenue.

Q. And you weren't busy at all, is that right?

A. No.

Q. Do you remember this person coming to your store and buying the liquor? [44]

A. Yes, I do.

Q. Very distinctly? A. Yes.

Q. Did you size him up and get a good mental

(Testimony of Virginia Shields.)

picture of the person at the time you accepted the check?

A. I recall what he looked like, yes.

Q. And did you make a special point to remember his appearance any more than you would on any other payroll check?

A. Oh, not any more than any other.

Q. You cash a lot of payroll checks or did at that time in that store, didn't you?

A. No, we didn't.

Q. You did not? A. No.

Q. Then how does it happen you accepted this one?

A. Well, I have cashed M-K checks before and they were good.

Q. So you accepted this one?

A. Yes, I did.

Q. Well, as a matter of fact, you have accepted a lot of payroll checks in that store in the course of your business, haven't you? A. A few.

Q. Now, you say you don't recall whether he bought whiskey or what, is that right? [45]

A. Whiskey, I would say.

Q. You would say. Well, do you recall?

A. Yes, it was whiskey.

Q. It was whiskey? A. Yes.

Q. Do you recall what he bought?

A. It was either Seagrams 7 or V.O.

Q. One bottle or two?

A. One. Just one bottle, a fifth.

Q. And took the entire change in cash, is that

(Testimony of Virginia Shields.)

right? A. Yes, he did.

Q. Now, you saw an identification card with his picture on it, is that right? A. Yes, I did.

Q. And compared the picture on the card, did you, with the person before you? A. Yes.

Q. When did you next learn or hear anything about that check?

A. When it came out in the papers.

Q. And when was that?

A. The following week. Tuesday I believe it was.

Q. You accepted the check on a Friday or a Saturday and heard nothing more about the incident until possibly the following Tuesday?

A. That is right. [46]

Q. And your information about having — or, your attention was redrawn to that check by reason of something you saw in the paper, is that right?

A. Yes.

Q. What did you see in the papers?

A. Just that the checks were going around the City of Anchorage.

Q. Actually the Fifth Avenue Liquor Store never presented the check for payment, did they?

A. Not to the bank, no.

Q. It was picked up by who?

A. A policeman.

Q. And in the course of your business after you accepted the check what did you do with it? Put it in the till of the cash register? A. Yes.

Q. And then turned it over to your relief or were you the manager of the store in any fashion?

(Testimony of Virginia Shields.)

A. No. Mrs. Peters owned and managed the store.

Q. Then in the course of the routine of your duties you would turn over your cash and checks to Mrs. Peters, is that right?

A. Yes. We left everything in the till. She took care of everything.

Q. Did you do that on that week-end or do you recall?

A. Turned over the cash you mean? [47]

Q. Cash and checks?

A. I just left it in the till. I had nothing to do with that.

Q. And heard nothing more about the matter until approximately the Tuesday following?

A. That is right.

Q. Now, did you then on the Tuesday following give any description or make any identification of the person who had brought the check to your store?

A. I didn't talk to anyone.

Q. And when did you next have occasion to consider the identity or description of the person who signed that check?

A. Oh, it was a year or so later that I was asked to identify the party.

Q. Over a year later. And from that point until today in court you were not asked to identify him, were you?

A. Once I identified him.

Q. Well now, prior to your identification here in court today weren't you advised where the man was sitting?

(Testimony of Virginia Shields.)

A. Today I wasn't advised where he was sitting.

Q. Wasn't there a gentleman who went back to you in the back of this room and pointed out where the defendant Smith was sitting?

A. Not today.

Q. Not today? A. No. [48]

Q. When did that last happen?

A. Yesterday.

Q. It happened yesterday, didn't it?

A. Yes.

Q. It was a gentleman in a brown suit, wasn't it?

A. I am not sure what color suit he had on.

Q. Who is the gentleman who came to you and told you where Smith was sitting?

A. Yesterday it was a policeman I believe.

Q. And—— A. I don't know his name.

Q. Which policeman?

A. Just a policeman.

Q. Well, which one? Is he in the room?

A. I don't see him.

Q. Do you know whether he is an Anchorage policeman or Territorial policeman or Federal policeman?

A. No, I don't. I wasn't informed. I don't know. Just a policeman.

Q. Where were you standing when he came to you and pointed out Mr. Smith?

A. Well, let's see. I believe I was in the District Attorney's office at the time, as far as I can remember.

Q. In the District Attorney's office yesterday?

(Testimony of Virginia Shields.)

A. Yes. [49]

Q. When he pointed out Smith to you?

A. Well, he had a drawing.

Q. Of where he was sitting in court?

A. Yes.

Q. I see. A. Yes, yesterday.

Q. What time yesterday? That was before we selected the jury, wasn't it, you came into court and stayed until the witnesses were excluded?

A. It was, yes. That was before the jury was picked.

Q. Did Mr. Plummer ask you to come to his office for that purpose or for any purpose?

A. No.

Q. How did you happen to be in Mr. Plummer's office?

A. I had a telephone call from the girl asking me to appear.

Q. To come down to the U. S. Attorney's office?

A. Yes.

Q. And that was before lunch or after?

A. That was in the morning.

Q. That was in the morning, and this gentleman, this police officer then was in Mr. Plummer's office with a diagram or did he draw the diagram after you came?

A. I didn't see him draw it so I wouldn't know.

Q. Did he make a sketch of the relative position that Mr. Smith occupied in the courtroom over in the Elks Club [50] there? A. Yes.

(Testimony of Virginia Shields.)

Q. And was the sketch all prepared when you showed up in the District Attorney's office?

A. Yes, when I saw it.

Q. It was all drawn up?

A. It was drawn up.

Q. It was handed to you and a certain position marked Smith? A. Yes.

Q. Did you subsequently use that sketch and go and take a look at Smith? A. No, I didn't.

Q. Didn't you go over to the courtroom?

A. Yes.

Q. You did, didn't you? A. Yes.

Q. Did you take a look at Smith?

A. I don't recall whether I did or not.

Q. Well now, Mrs. Shields, you are here for one purpose only, aren't you, to identify a check of Mr. Smith? A. Yes.

Q. Well, didn't you after receiving that sketch at Mr. Plummer's office go over and take a look at Mr. Smith?

A. We went in and sat down. I looked at him when I sat down.

Q. You did look at him? [51]

A. When I sat down.

Q. Well, whether you were sitting down or standing up, you did look at him, didn't you?

A. Yes, I glanced over.

Q. You glanced over and saw him. You made a mental picture that that is Smith, didn't you? He was dressed just like he is now, wasn't he?

A. Yes.

(Testimony of Virginia Shields.)

Q. And so today you recognize Smith as being the same man that was pointed out to you by means of a diagram in the Elks Club courtroom yesterday, isn't that right? A. Yes.

Q. Did you observe this man who cashed that check place his signature on it, Mrs. Shields?

A. Yes.

Q. And did you compare the signature on it with the signature or the name on the identification card? A. Yes, I did.

Q. And you don't recall though what type of identification card he had, is that right?

A. No, just a card with his picture on it and name.

Q. Was there a signature on the identification card or merely a typed name?

A. I don't recall now.

Q. Don't you ordinarily require as identification something [52] with a man's signature on it?

A. Or a picture. Yes, like an I.D. card or something like that.

Q. You don't recall whether there was a signature or not on the card that was used to identify—— A. No, I don't.

Q. Nor the type card it was?

A. No, I don't know what type of card it was.

Q. And do you recall specifically the person signing the check? A. Yes.

Q. What did he use as a support in order to sign the check? Counter?

A. Yes, we have a counter.

(Testimony of Virginia Shields.)

Q. Is there a counter there?

A. Yes, there was.

Q. And did you watch him as he signed it?

A. Yes.

Q. Did he borrow a pen from you to sign it?

A. I don't recall.

Q. Well, do you recall anything else in connection with the signature? A. No.

Q. Do you recall whether he signed with his left hand or his right hand or how? [53]

A. No, I don't recall which hand.

Q. You don't recall that. You do recall, however, that you recognize the man immediately a year later after he was shown to you?

A. Yes, I recognize him.

Q. And after the diagram was presented to you, you then took another look at him yesterday in the Elks Club? A. Yes.

Q. Mrs. Shields, did you cash any other checks over that Labor Day week-end, payroll checks?

A. No.

Q. Had you, or did you have occasion to cash any other M-K checks in that area of time, that is, shortly before or shortly after Labor Day?

A. No. Just that one.

The Court: A little louder so the jurors can hear you.

A. No. I just cashed that one.

Mr. Nesbett: That is all.

The Court: Mr. Hepp, do you have any questions?

(Testimony of Virginia Shields.)

Mr. Hepp: I have no questions.

The Court: Mr. Kay.

Mr. Kay: Just a moment, your Honor.

The Court: Very well.

Mr. Kay: I have no questions. [54]

The Court: Very well. Any redirect, counsel?

Mr. Plummer: Just several questions, your Honor.

Redirect Examination

Q. (By Mr. Plummer): Mrs. Shields, is there any doubt in your mind that the gentleman sitting here is the gentleman who cashed the check on this Labor Day week-end?

A. There is no doubt.

Q. Now, to clear up any misunderstanding that might arise, although you did not talk with me did you talk with somebody else in my office?

A. Yes.

Q. And it was one of my assistants?

A. I guess so. I don't know his name.

Q. You don't know the gentleman's name?

A. No, I don't.

Mr. Plummer: That is all the questions I have.

The Court: Is there any recross?

Mr. Nesbett: Could I ask another question, your Honor.

The Court: Pertaining to prior direct or redirect?

Mr. Nesbett: Would be hard to say. I am sure there [55] won't be any objection.

The Court: You may proceed.

(Testimony of Virginia Shields.)

Recross Examination

Q. (By Mr. Nesbett): Mrs. Shields, there are other employees in that liquor store, are there not?

A. No. Mrs. Peters and myself were the only two.

Q. Do you know whether Mrs. Peters took any checks over that week-end, the M-K checks?

A. No, she didn't.

Q. She did not? A. No.

Q. It is a grocery store combined with a liquor store, is it? A. Yes.

Q. Six hundred block on East Fifth?

A. 603 East Fifth Avenue.

Mr. Nesbett: That is all.

The Court: Very well. You may step down then, Mrs. Shields.

(Thereupon, the witness was excused and left the stand.)

The Court: You may call your next witness.

Mr. Plummer: Ask the bailiff to summon Mr. Henry Futor. [56]

HENRY FUTOR

called as a witness for and on behalf of the Plaintiff, and being first duly sworn, testifies as follows on

Direct Examination

The Court: You may proceed, Mr. Plummer.

Q. (By Mr. Plummer): Would you please state your name, sir?

A. Henry Futor, F-u-t-o-r.

(Testimony of Henry Futor.)

Q. And will you tell us what your occupation was over the Labor Day week-end of 1956?

A. Clothing salesman at the Hub Clothing Company.

Q. And that is still your employment, is it?

A. Yes.

Q. Who is your employer?

A. Harold Koslosky.

Q. Now, what, if anything, unusual occurred on that week-end as regards the case?

A. Well, that Saturday prior to the Labor Day holiday we processed and cashed three supposedly good Morrison-Knudsen checks.

Mr. Plummer: May I have this marked for identification. It will probably be No. 9.

The Court: Yes.

Mr. Plummer: I will show it to counsel. [57]

The Court: Yes, if you will please.

(Thereupon, the document was handed to defense counsel and thereafter returned to Mr. Plummer.)

Mr. Plummer: May I approach the witness, your Honor.

The Court: You may.

Q. (By Mr. Plummer): Mr. Futor, I hand you what has been marked for identification only as Plaintiff's Exhibit No. 9 and ask you to look it over and tell me what it is, if you know?

A. Well, this is one of the checks that we cashed down there on that Saturday.

Q. Would you tell me what it purports to be?

(Testimony of Henry Futor.)

A. Pardon me?

Q. Will you tell me what it purports to be, if it has a company name and a number and the amount and the payee?

A. Well, it is a Morrison-Knudsen check, with a signature and the amount of—net amount of \$177.47.

Q. And would you tell me the name of the payee, sir?

A. Wendell R. Ware.

Q. Would you tell me the serial number of the check?

A. Serial number of the check is 8833.

Q. Do you know from your own recollection, did you take any of these checks that day?

A. Well, I did. I handled all three of them and waited on the customers and in each case they made a purchase and I did [58] inspect the identification, such as it was, and verified the signature on the identification card with a signature on the check, endorsement on the check and assumed that they took—they were in order and Mr. Koslosky then deducted the amount of the purchase and handed over the change.

Q. And do you recall, sir, what the items were they purchased, these people, if you know?

A. Well, I do. The first purchase was a pair of Red Wing, by brand name, boots.

Mr. Nesbett: Could I interrupt merely to ask if he testifies to all three checks or as to this check?

Mr. Plummer: He is testifying now as to the three purchases made by M-K checks that week-end.

(Testimony of Henry Futor.)

Mr. Kay: I object, your Honor, to any testimony concerning the other two checks unless they are counts in this indictment.

The Court: Are they in the indictment, counsel?

Mr. Plummer: I think not, your Honor, but I will——

The Court: Objection sustained then.

Mr. Plummer: May I be heard before you rule?

The Court: Well, I have ruled but you may be heard.

Mr. Plummer: I was going to mention to the court and to Mr. Kay, of course, the very, very common rule of the same and similar transactions prove motive, mistake and so on. I think it is a very valid proffer, but rather than struggle with the [59] thing at this time I will withdraw my question. I will advise Mr. Kay, however, that one of these days when he makes it I am going to cite him some law.

Mr. Kay: Fine, we will have a good time.

Mr. Plummer: If I may have just a minute to collect my thoughts, your Honor.

The Court: Yes, you may.

Q. (By Mr. Plummer): Now, Mr. Futor, I wonder if you would be good enough to look around the courtroom and see if you recognize anybody in this courtroom that passed one of those checks to you on that date?

Mr. Nesbett: I object to that question, your Honor. It is not confined to the exhibit that is before the court for identification. The only question

(Testimony of Henry Futor.)

is, can he identify the person who passed that check.

The Court: Objection sustained. He may rephrase the question.

Q. (By Mr. Plummer): Did you take all three M-K checks, make the sales on all three M-K checks? A. I did.

Q. And is the party, or, can you recall, sir, the name that the party used?

The Court: Pardon me just a moment. Mr. Johnson, that [60] is not the gentleman. There was another gentleman came in and maybe he is in the hall. That is all right. He is not smoking in the courtroom now. That is my concern. It is so close in here at best, besides the fact you are never permitted to smoke in the courtroom anyway. I am sorry, Mr. Plummer.

Mr. Plummer: Thank you, your Honor.

Q. (By Mr. Plummer): Do you recall the name that was used in the endorsement of the check that you took, sir? Was it Wendell R. Ware?

A. Well, I don't recall that from memory, Mr. Plummer, but as it comes back to me—naturally, I see it here.

Q. Yes, and will you look at the back of the check that you have. Would you see how it is endorsed? A. Endorsed Wendell R. Ware.

Q. Do you recognize in the courtroom the party that so endorsed and negotiated that check?

A. I am afraid I can't.

(Testimony of Henry Futor.)

Mr. Plummer: May I have just a minute, your Honor.

The Court: You may.

Q. (By Mr. Plummer): Can you testify, sir, that that is one of the three checks that were taken in on that day?

Mr. Hepp: I object; leading and suggestive. I don't think that is a proper question.

The Court: The objection is overruled. He may answer [61] that question.

A. Well, I can testify that it is one of the three checks that was taken that day, definitely.

Q. But——

A. Without question in my mind this is definitely one of the three checks that was taken in that day at the store.

Q. Now, subsequent to its being taken in on that date do you know what, if anything, happened to the check?

Mr. Hepp: I object. I believe this witness can state what he may have done with the check. I think the question is too broad and would bring in possibly a dangerous answer. We can't evaluate the answer or his offers. He can state those things that he did. I think what was done is very broad and we ask it not be allowed.

Mr. Plummer: He can state if he knows, your Honor.

The Court: But only if you know, Mr. Futor. You may state as to what did take place with the check, if anything.

(Testimony of Henry Futor.)

A. Well, of course, the check——

The Court: That is, of your own personal knowledge. What somebody else may have told you may not be proper. Do you understand that?

A. Yes, sir. Well, in that case then, after they left my hands Mr. Koslosky completed the transaction.

Mr. Hepp: Now, I object to the witness continuing then, this being purely hearsay. [62]

Mr. Plummer: Let him tell what he saw until he starts telling what——

Mr. Hepp: He said Mr. Koslosky completed the transaction.

Mr. Plummer: He hadn't completed his answer. Maybe he has——

Mr. Hepp: I believe it is going to be dangerous. Once it is out it is too late.

The Court: Mr. Futor, I have instructed you not to testify as to what somebody may have told you, but what you actually know of your own knowledge, and you have testified that Mr. Koslosky completed the transaction. Now, you may proceed, counsel.

Q. (By Mr. Plummer): Now, did you or did anybody else within your sight have any further dealings with this check, sir, or do you know of your own knowledge anything further about this check, not what somebody told you but of your own knowledge?

A. Well, of my own knowledge I know they were deposited in the bank in the National Bank of Alaska.

(Testimony of Henry Futor.)

Mr. Hepp: I object to that and ask it be stricken. I don't see how he could possibly know that of his own knowledge. It would have come to him as purely hearsay and that is what we have been trying to avoid.

The Court: How do you know?

Mr. Plummer: The witness testified, he said of his [63] own knowledge he knew it was.

The Court: The objection is overruled until it is established that he is testifying from hearsay, of course, in which event then it would be highly improper.

Mr. Hepp: Excuse me. May I ask the court to instruct the witness as to what the word knowledge means in that sense. To a layman it means anything he comes by knowing in any manner and it may be told to him by somebody else and he then deems it his knowledge, and it is still objectionable.

The Court: In this sense, Mr. Futor, the word knowledge is used in a restrictive sense, only what you personally know, not what may have come to your attention. Now, you have testified that this check was deposited in the bank. Do you know that of your own knowledge or what somebody else told you?

A. Well, it was the procedure in this business.

The Court: Well, the objection is sustained then.

Q. (By Mr. Plummer): Now, did you have occasion, sir, to see the check again after that weekend when it was presented to you as part of the payment for the sale you made? A. I did.

(Testimony of Henry Futor.)

Q. And would you tell us when that was, sir?

A. Well, when this check was returned to the Hub Store by their bank, the one in which it was deposited, with the bank's notation—just what the notation was on there I have [64] forgotten, but it was either an unauthorized signature or counterfeit or forgery. I rather think it was unauthorized signature, whatever they stamped on there.

Mr. Hepp: I am going to object to that testimony. This witness is guessing at what may have been on it when it came from the bank.

The Court: The objection is sustained. You may testify as to what was on it.

Mr. Hepp: I would like to have that portion of his testimony stricken from the record.

The Court: The motion is granted and the jury is instructed not to consider the answer given by this witness. You may proceed.

Mr. Plummer: May I have just a minute.

The Court: Yes, you may.

Mr. Plummer: I have no further questions.

Cross Examination

Q. (By Mr. Nesbett): Mr. Futor, did you take all three of the M-K checks that were received by your store on that day?

A. I did and I processed them.

Q. Are you the manager there in Mr. Koslosky's absence? [65]

A. Oh, after a fashion, yes.

(Testimony of Henry Futor.)

Q. But you do pass on all the checks that are presented for cashing, is that right?

A. In many instances, yes, if he doesn't—happens to be away or out.

Q. After you had cashed the checks Mr. Koslosky had the most to do with them thereafter, is that right?

A. I didn't get that?

Q. I say, after you had accepted the checks Mr. Koslosky had the most to do with them thereafter, did he not?

A. Oh, yes. Yes.

Q. And it was more his concern as owner of the store than yourself as manager, isn't that a fact?

A. Right.

Q. Now, actually, Mr. Futor, until you were reminded of the name Wendell Ware you wouldn't have known that that check, as you say now, was one of those accepted, isn't that the fact?

A. Well, I just didn't quite understand that question.

Q. When were you subpoenaed to appear here?

A. Yes, sir.

Q. And on what date were you subpoenaed to appear?

A. I didn't bring the subpoena.

Q. Was it to appear yesterday?

A. I was subpoenaed to appear. [66]

Q. Yesterday?

A. Yes, sir.

Q. And did you appear first in response to that subpoena at the courtroom at the Elks Hall?

A. Yes, sir.

Q. Or did you appear in Mr. Plummer's office?

(Testimony of Henry Futor.)

A. Well, I appeared at the office and then was instructed to go to the courtroom in the Elks Club.

Q. And at the time you reported to the office did you discuss the matter of checks that had been received by Koslosky's Store with Mr. Plummer or any of his staff? A. No.

Q. Did you discuss the checks that Koslosky's Store had received with Mr. Plummer at the courtroom yesterday? A. No, sir.

Q. Or did you discuss it last night or today with him prior to taking the witness stand?

A. No, sir.

Q. It is only because the check was handed to you on the witness stand that you happened to remember that it is one of the three checks you took that day, is that right? A. Yes, that is right.

Q. You have no recollection then other than that it was one of the three?

A. Well, I have the recollection that this is one of the three. [67]

Q. What causes you to remember that it was one of the three?

A. The amount. I remember the amount very well. \$177.47. The date. Pay period ending August 19. We were cashing this along about September 2nd. That all is remindful to me of this check.

Mr. Nesbett: That is all, your Honor.

The Court: Mr. Hepp.

Mr. Hepp: I have no questions.

The Court: Mr. Kay.

(Testimony of Henry Futor.)

Cross Examination

Q. (By Mr. Kay): Mr. Futor, just one question. Do you recall what time in the afternoon it was when you cashed this check?

A. Mid afternoon.

Q. 3:00 o'clock, 4:00 o'clock?

A. Between 2:00 or 3:00, I'd say.

Mr. Kay: That is all the questions I have.

The Court: Any redirect, counsel?

Mr. Plummer: No, your Honor.

The Court: It is now after 3:00. Should we take a short recess at this time?

Mr. Plummer: Satisfactory with the prosecution. [68]

The Court: Very well. Court will go into recess for a period of 10 minutes.

(Whereupon, at 3:10 o'clock p.m., following a 10-minute recess, court reconvenes and the following proceedings were had:)

The Court: Let the record show all the jurors are back and present in the box. You may call your next witness.

Mr. Plummer: May I inquire if there are any witnesses in the courtroom that are under Government subpoena? Your Honor, I would like to call—for the sake of the record the last check we talked about was No. 8833. It was mentioned in Count 3 of the indictment. I would like next to call Mr. Ivan Barton. * * * * *

The Court: Now, your next witness, please.

Mr. Plummer: Mr. Barton.

IVAN BARTON

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

Q. (By Mr. Plummer): Would you please state your name, sir? A. Ivan Barton.

Q. And would you tell me what your occupation was over the Labor Day week-end of 1956 here?

A. I am a partner in the Union Club.

Q. And were you a working partner that day at the Union Club? A. Yes.

Q. On duty there? A. Yes.

Mr. Plummer: May I approach the witness, your Honor.

The Court: You may.

Q. (By Mr. Plummer): Mr. Barton, I hand you what has been marked for identification only as Plaintiff's Exhibit No. 10 and ask you what it is, if you know? A. It is a check.

Q. And will you be good enough to tell us the name of the company, the name of the payee, and the serial number of the check?

A. It is a Morrison-Knudsen Company check. Payee is Wendell R. Ware. \$177.47.

Q. What is the serial number on the check?

A. 8895.

Q. Now, have you had occasion to see that check before? A. Yes, I have seen it before.

Q. Did you have occasion to see it on Labor Day week-end 1956?

(Testimony of Ivan Barton.)

A. Well, I saw it when it come back from the bank after the week-end.

Q. Will you tell us, sir, if you know who cashed that check in your establishment? [70]

A. No, I don't know who cashed this particular check. There was four checks presented.

Mr. Hepp: Just a moment. I object to any further. I think the witness responded to the question and I ask another offer be made.

The Court: I feel, Mr. Hepp, that the answer to the question was responsive. He was explaining why he didn't know this——

Mr. Hepp: I quite agree with the court. I was asking that he not continue on until after he had been asked for another offer so we can evaluate it.

The Court: Thank you. You may proceed, Mr. Plummer.

Mr. Plummer: Thank you, your Honor.

Q. (By Mr. Plummer): Now, did you receive a check, Morrison-Knudsen check that week-end which was made payable to the order of Wendell R. Ware? A. Yes.

Q. And was there a gentleman that you noticed that week-end in your establishment who purported to be Wendell R. Ware?

Mr. Nesbett: I object to that question, your Honor, as having no connection whatsoever with the case. He admits that he wasn't there over the week-end. He is not competent to answer. He came back after the week-end and saw the checks.

Mr. Plummer: That wasn't his testimony, your

(Testimony of Ivan Barton.)

Honor. If the record is read back that is not his testimony. [71]

The Court: The objection is overruled. He may answer the question; of your own knowledge, of course, Mr. Barton, not what somebody may have told you.

A. Will you repeat the question?

The Court: It may be read back.

(Thereupon, the Reporter read Question
Line 18 Page 71.)

A. Yes.

Q. (By Mr. Plummer): And do you see him present in the courtroom today? A. I do.

Q. And will you point him out to the court and jury?

A. He is right back of the gentleman right back there (pointing) third seat in.

Q. Third seat in the front row?

A. Uh-huh.

Q. Would this be the gentleman, sir?

A. That is the gentleman.

Q. And if his name is Charles E. Smith it would then be Charles E. Smith, is that correct?

A. Uh-huh.

The Court: You will have to speak louder, Mr. Barton, please.

A. Yes.

Mr. Plummer: May I have just a minute, your Honor.

The Court: You may. [72]

Q. (By Mr. Plummer): Now, do you know, sir,

(Testimony of Ivan Barton.)

what happened to this check after it was taken in during the normal course of business over that Labor Day week-end, of your own knowledge?

A. Well, I didn't take it myself to the bank, but my partner took it to the bank.

Mr. Hepp: Just a moment. I object. That is hearsay. I think he responded he didn't take it to the bank.

The Court: The objection is sustained beyond the fact that you don't know what happened after the week-end.

Mr. Plummer: May I ask one further question, your Honor.

The Court: Very well.

Q. (By Mr. Plummer): Did you see it after the Labor Day week-end around your establishment?

A. Yes.

Q. And what was the occasion for you seeing it, sir?

A. Well, I come down to work, I think it was probably Thursday, and the check was back from the bank. Our bank is not the First National Bank. Our bank is the Bank of Alaska and it takes a couple of days to process it through the bank and I don't remember which day it was of the week.

Q. And was the check honored when presented for payment, sir?

A. No, it was deducted from our account.

Mr. Plummer: May I approach the witness, your Honor. [73]

The Court: You may.

(Testimony of Ivan Barton.)

Mr. Plummer: I offer what has been marked for identification only as Plaintiff's Exhibit No. 10 in evidence.

The Court: Is there any objection?

Mr. Hepp: We object to it and we'd like to ask some questions of this witness.

The Court: You may do so.

Q. (By Mr. Nesbett): Mr. Barton, what hours or shift did you work over that Labor Day week-end? A. From 5:00 until closing.

Q. 5:00 p.m. until closing? A. Yes.

Q. That would be until 1:00 a.m.?

A. Well, I think it was 2:00 a.m.

Q. 2:00 a.m., and on what days did you work? All the days? A. All the days.

Q. All the days of that holiday week-end?

A. All the days.

Q. Now, you have known the defendant Charles Smith for a long time, haven't you?

A. No, I haven't.

Q. Well, haven't you known him in the construction industry, his superintendent, co-workers for a number of years?

A. No, I haven't known him personally. [74]

Q. You have known of him, is that right?

A. Well, I don't think I even knew of him that I know of.

Q. Do you remember yourself taking this check in and giving cash for it?

A. I don't remember of taking that check and giving cash for it.

(Testimony of Ivan Barton.)

Q. You cash lots of payroll checks there, don't you? A. Yes, quite a few.

Q. At the Union Club? A. Yes.

Q. As a matter of fact, you advertise over the radio, "Come to the Union Club. We cash payroll checks", don't you? A. That is right.

Q. And you don't remember this check at all, do you?

A. I remember the check. Surely, I remember the check. It comes back from the bank and you have to pay the bank \$177.00 for it, you sure remember.

Q. That is your only connection with this check, isn't it? A. Except cashing it.

Q. You remember cashing it yourself?

A. Well, it was cashed in the place.

Q. But you, yourself didn't? You don't remember cashing it yourself, do you?

A. I don't remember cashing it.

Q. No. Now, have you talked to Mr. Plummer prior to coming [75] into court today about Wendell R. Ware? A. Yes.

Q. And when did you last discuss Wendell R. Ware with him?

A. Well, I don't think I discussed Mr. Ware recently with Mr. Plummer. I did with his assistant, I guess it is, in his office.

Q. I see. Well, when did you discuss Mr. Ware with Mr. Plummer's assistant?

A. This week sometime, last week. Latter part of last week. I think it was Thursday.

(Testimony of Ivan Barton.)

Q. Last Thursday. Now, Mr. Barton, have you discussed the case at all with Mr. Plummer or his assistant since last Thursday?

A. Except, I think it was yesterday.

Q. You discussed it with him yesterday, didn't you?

A. He told me the things about the court that I would be asked; not particularly about the check.

Q. And where was that discussion had, over in his office?

A. Over in his office.

Q. And was Sgt. Laird here present?

A. I don't think so.

Q. You did, of course, discuss Mr. Smith and how he appeared and so on, did you not?

The Court: Pardon me. Now you are going into cross examination here. This is for the purpose of admission or denial [76] of admission of this check.

Mr. Nesbett: Well, I thought that he was through with his direct.

The Court: But then the only thing before the court is the admissibility or inadmissibility of the check.

Mr. Nesbett: I see. All right, your Honor, I am sorry. I will confine it strictly to the check.

The Court: Very well.

Q. (By Mr. Nesbett): Then you, yourself don't remember this check coming across the counter of the Union Club? Your only recollection or remembrance of it, you say, as partner there you had occasion to notice it came back from the bank, is that right?

(Testimony of Ivan Barton.)

A. No. I know it come across the counter while I was on shift so I must have cashed it because the checks cashed in the day time by my partner, he bales them up. When I come down it is an empty box. It was in the bale of this cash from the night shift.

Q. So you must have cashed it?

A. I must have cashed it.

Mr. Nesbett: I have no further questions on the check, your Honor.

The Court: Mr. Hepp, do you have any questions on the check itself?

Mr. Hepp: Mr. Nesbett has covered the field I wanted. [77]

Mr. Plummer: I renew my offer, your Honor.

The Court: Is there objection?

Mr. Nesbett: I certainly agree with Mr. Hepp's objection. The objections stands, must be ruled on.

The Court: Objection overruled. It may be admitted and marked Government's Exhibit No. 10.

Mr. Plummer: I have no further questions, your Honor, of Mr. Barton.

The Court: Could you advise the court as to which count?

Mr. Plummer: I am sorry, your Honor. This is Check 8895 mentioned in Count No. 4 of the indictment.

The Court: Thank you. Now, you may cross examine Mr. Nesbett.

Cross Examination

Q. (By Mr. Nesbett): You don't remember

(Testimony of Ivan Barton.)

or five feet from the little counter where we used to cash checks.

Q. Well, did you call a person over and ask him about the check, [80] is that——

A. No, I didn't. Just to look at his identification.

Q. You came to the conclusion that must have been what happened, is that right?

A. Pardon?

Q. You came to the conclusion you must have done that when you were thinking it over later, is that right?

A. That is right.

Q. Why did you say then in response to the question that you don't remember cashing this check? If you remember a Wendell R. Ware and you remember that this must have been the man, why do you say you don't remember cashing this check?

A. Well, there was four of those checks come in on the week-end and I don't remember which particular check that was, Wendell R. Ware's or the other checks. It was one of those M-K checks.

Q. Now, Mr. Barton, were you told yesterday in Mr. Plummer's office to look for Mr. Smith over at the Elks Club?

A. To look for him?

Q. Yes. A. No.

Q. Were you told where he might be sitting?

A. Yes.

Q. Were you given a diagram of where he might be sitting? [81]

A. No.

(Testimony of Ivan Barton.)

Q. Did you see a diagram or sketch that portrayed the relative positions of persons in the courtroom? A. No.

Q. You were told then where Mr. Smith was sitting, is that right?

A. I was told where he was sitting.

Q. And were you told to take a look at him?

A. No.

Q. You were just told, "There is where Smith is going to be sitting", is that right?

A. I was asked if I knew him, where he was sitting, and I said yes; if I knew his face. I said yes.

Q. Why did they then go on to tell you where he was sitting?

Mr. Plummer: I object to that question. He can't answer that.

Mr. Nesbett: Maybe he can't but I want the court to be aware of it, your Honor.

The Court: Well, the objection will be sustained to that question, but you may rephrase your question and ask if he knows why they told him.

Q. (By Mr. Nesbett): Do you know why the District Attorney went ahead and told you where Smith was sitting when you told him in the first instance that you knew Smith? [82]

A. I don't know why.

Q. You don't know that?

A. No, I don't.

Q. Well, the only logical conclusion would be——

Mr. Plummer: I object to any——

(Testimony of Ivan Barton.)

The Court: Objection sustained.

Mr. Nesbett: I haven't asked the question.

The Court: Excepting this, you are making a statement.

Mr. Nesbett: I will make a question of it.

The Court: The question now attempted to be stated is improper and the objection is sustained.

Q. (By Mr. Nesbett): You indicated some doubt about whether or not you could recognize Smith or Ware, didn't you, to Mr. Plummer before he told you where he was sitting?

A. No, I didn't at all because I knew I could recognize him because I have saw him around town here since—for the last month or two.

Q. Was he pointed out to you when he came to town at all? A. No.

Q. I asked you in the first instance if you hadn't known him for a number of years. You have, haven't you? A. No, I haven't.

Q. But you knew him when you saw him around town?

A. I had already been down to the Marshal's Office. [83]

Q. So you remember it from that incident, is that right? A. Yes.

Q. Well now, why did you go on over to the courtroom after you had talked to Mr. Plummer yesterday?

A. He told me to go—the girl in the office told me to go over to the courtroom.

Q. You wanted to take a look at Smith, didn't

(Testimony of Ivan Barton.)

you? He asked you to take a look at Smith, didn't he? A. No.

Q. Well, he asked you if you recognized Smith, didn't he?

A. I don't remember him asking that question.

Q. Well, he asked you if you knew Smith, didn't he?

A. He asked me if I knew Smith but not yesterday. That was previous to that.

Q. You said, "Yes, I know him", didn't you?

A. Yes.

Q. Yet he went ahead to take the trouble to tell you exactly where he was sitting in the courtroom, didn't he?

A. I don't remember whether he told me exactly where he was sitting.

Q. Well, I understood now in your previous testimony, Mr. Barton, that he did tell you?

A. Well, he probably did tell me.

Q. Then which is true? He did tell you, didn't he?

A. I don't think Mr. Plummer ever did tell me where he was sitting. [84]

Q. That was his assistant, wasn't it?

A. I think it was his assistant that told me where he would be sitting.

Q. Was it Sgt. Laird here to my right?

A. Over in the Elks, you mean, yesterday?

Q. Yes.

A. Yes, I think Sgt. Laird told me where he was sitting.

(Testimony of Ivan Barton.)

Q. He told you where he was sitting over in the Elks Club, did he? At the Elks Club did Sgt. Laird tell you where Smith was sitting?

A. Yes.

Q. Who in Mr. Plummer's office told you where he would be sitting?

A. I think it was his assistant, probably.

Q. Thin assistant, wore glasses, Mr. Duggar?

A. Well, I don't remember. Somebody told me over there where he would be sitting.

Q. Well, you were told in the office, then by Sgt. Laird over in the courtroom. Now, were you reminded again here today where he might be sitting in the courtroom? A. Uh-huh.

Q. You were? A. Yes.

Q. Who reminded you on that occasion?

A. I think it was Mr. Anderson. [85]

Q. Mr. Anderson?

A. I think his name is Anderson.

Q. Who is he, do you know? Is he in the room? A. He is a City Detective, I think.

Mr. Nesbett: I have no other questions.

The Court: Mr. Hepp.

Mr. Hepp: I just have one question.

Cross Examination

Q. (By Mr. Hepp): This may have been answered, but it has escaped me. If you didn't see this check cashed or have no recollection of it what is your explanation as to how you know who cashed it?

(Testimony of Ivan Barton.)

A. I don't know who cashed it. I know that I cashed it. I mean, I don't know who presented it.

Q. You mean, the person who came in and offered it?

A. I don't know except from recalling instances in cashing checks, that you do in a place, and when it comes back from the bank and I begin to wonder who cashed it, if I knew the people.

Q. So you have wondered into a belief that it may be somebody in this courtroom, is that right?

A. I don't know that it was cashed by this man in the courtroom, but I know that I have cashed checks for him in the place.

Q. Did I understand you to say you don't know whether this check here was cashed by anybody in this courtroom?

A. No, I don't.

Q. You don't know?

A. No, I don't.

Mr. Hepp: Thank you.

The Court: Mr. Kay.

Mr. Kay: Just one question.

Cross Examination

Q. (By Mr. Kay): I believe you went on duty on that week-end at 5:00 o'clock in the afternoon?

A. Yes.

Q. So this check couldn't have been cashed before 5:00 o'clock on Saturday afternoon?

A. That is right.

Q. Is that right?

A. Yes.

Q. It could have been cashed any time after

(Testimony of Ivan Barton.)

5:00 on Saturday [87] afternoon, that night, or on Sunday? A. Or on Sunday.

Q. Or on Monday?

A. No, it was almost certain it was Saturday night, but it could have been cashed Saturday or Sunday.

Q. After 5:00 o'clock on Saturday?

A. Yes.

Mr. Kay: That is all.

The Court: Any redirect, counsel?

Mr. Plummer: No, your Honor.

The Court: Very well.

Mr. Hepp: At this time we'd like to have the court re-rule upon the admissibility of that instrument that is brought in. It has become very evident that the person who has identified it doesn't connect it up with any of the crimes charged in this indictment or to any of the defendants that are here in court.

The Court: Objection overruled. You may step down.

Mr. Nesbett: May I have just a moment, your Honor.

The Court: Yes, you may.

Mr. Plummer: Would you stay available, Mr. Barton, for a few minutes.

Mr. Nesbett: I asked for a moment. I may want to ask him a question.

The Court: Yes.

Mr. Nesbett: No other questions, your Honor.

The Court: Very well. You may step down,

(Testimony of Ivan Barton.)

Mr. Barton. Thanks for coming. You may be excused.

(Thereupon, the witness was excused and left the stand.)

The Court: Another witness may be called.

* * * * *

The Court: Now, Mrs. Burnett, you may come before this lady here.

HELEN BURNETT

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

The Court: You may proceed, counsel.

Q. (By Mr. Plummer): Would you please state your name? A. Helen Burnett.

Q. Do you and your husband have a joint business venture here in the City of Anchorage?

A. Yes, we do.

Q. Would you tell me the name?

A. The Club Bar.

Q. And did you so own it on the Labor Day week-end of 1956? A. Yes, we did.

Q. And do you and your husband both work in the bar? A. Yes, we do. [89]

Q. And were you working there that week-end?

A. Yes, I was.

(At this time a document was handed to defense counsel and thereafter handed back to Mr. Plummer.)

(Testimony of Helen Burnett.)

Mr. Plummer: May I approach the witness, your Honor.

The Court: You may.

Q. (By Mr. Plummer): I hand you, Mrs. Burnett, what has been marked for identification only as Plaintiff's Exhibit No. 11 and ask you if you will tell us what it is?

A. It's one of the checks that I cashed over the Labor-Day week-end.

Q. And would you tell me—reading the heading on the check, the payee, the serial number, and the amount?

A. Morrison-Knudsen Company Check No. 8965 to be paid to the order of Wendell R. Ware in the amount of \$207.26.

Q. Now, do you know who accepted that check on behalf of your establishment?

A. Yes, sir, I did.

Q. And would you give us some of the details, if you recall, when you accepted it?

A. Yes, sir. The gentleman came in, asked me if I would cash a check for him. I said yes if it were a pay check. He handed me the M-K check and the identification badge with his picture on it. I proceeded to cash the check [90] and give him the money and he in turn ordered a drink. I believe he ordered a drink, whiskey and a beer.

Q. Maybe a shot and beer chaser?

A. Uh-huh.

Q. And did he endorse the check in your presence? A. Yes, he did.

(Testimony of Helen Burnett.)

Q. And will you look at the back of the check and did he endorse it with that name?

A. Yes, he did.

Q. Now, this identification card that he presented to you, did that correspond with the face of the man that presented the check?

A. Yes, it had his picture on it.

Q. Now, will you tell us if you see that man in court here today?

A. Yes, I do. He is sitting right over there. The third gentleman in the first row.

Q. That would be this gentleman in the blue suit with the handkerchief in his pocket?

A. Yes, sir.

Q. If his name is Charles E. Smith, is that Charles E. Smith? A. That is the gentleman.

Q. Mrs. Burnett, did you later cause this check to be deposited in the bank?

A. Yes, sir, on the following Tuesday. [91]

Q. And was the check honored when it was presented for payment?

A. It was honored at that time, however, it was later declared to be a forgery and returned.

Q. What bank did you present it to?

A. The First National Bank.

Q. And it was later returned to you and dishonored?

A. This check was not returned to me, no, sir. A photostatic copy was.

Q. And did they advise you at that time why they did not return it? A. Yes.

(Testimony of Helen Burnett.)

Q. Will you tell me why?

A. It was a forged check.

Mr. Plummer: May I approach the witness, your Honor.

The Court: You may.

Mr. Plummer: I am going to offer this in evidence. I show it to counsel again.

(The document was handed to defense counsel.)

The Court: Is there objection?

Mr. Hepp: Just a moment.

The Court: Surely.

Mr. Nesbett: Your Honor, I object to the acceptance of the check into evidence and ask if your Honor would be good enough to reserve your ruling on it until after the cross [92] examination. In view of what happened with respect to the last check, your Honor, we thought if your Honor would delay ruling until after all the evidence is in it might——

The Court: Well, counsel, though we must take these matters as they come up. If we don't it is very easy to forget. I would prefer to follow the customary and standard practice of the court. Now, counsel have leave to interrogate at this time as to the admissibility or inadmissibility of this check only, then you may thereafter cross examine as to other facts. Do you wish to examine at this time?

Mr. Nesbett: I have no desire to examine as to the check.

(Testimony of Helen Burnett.)

The Court: Mr. Hepp?

Mr. Hepp: Well, no. I certainly make an objection at this time and I know the court has ruled.

The Court: Very well. Objection overruled. It may be admitted and marked Plaintiff's Exhibit No. 11.

Mr. Plummer: May I for the sake of the record advise the court and the jury that we are talking about Check No. 8965 which is mentioned in Count 5 of the indictment.

The Court: Thank you.

Mr. Plummer: I have no further questions of this witness, your Honor.

The Court: You may cross examine, Mr. Nesbett. I'd like to suggest to counsel that we have a stipulation from counsel [93] that as exhibits are admitted they may be read in whole or in part at that time and/or counsel may reserve the right to read or refer to these exhibits at a later time in whole or in part or in use in argument to the jury only.

Mr. Plummer: That would be satisfactory with the prosecution, your Honor.

Mr. Nesbett: That is agreeable to the defendant Smith.

The Court: Mr. Hepp.

Mr. Kay: Yes, I will stipulate.

The Court: Mr. Hepp.

Mr. Hepp: Yes.

The Court: Very well. That will be the order. You may proceed, Mr. Nesbett.

(Testimony of Helen Burnett.)

Cross Examination

Q. (By Mr. Nesbett): Mrs. Burnett, did you cash a number of payroll checks in the Club Bar over that particular week-end? A. Yes, I did.

Q. Do you know approximately how many you cashed?

A. No, at this time I wouldn't have any idea.

Q. You do cash quite a number of those payroll checks there, [94] do you not? A. Yes.

Q. For construction people, railroad people?

A. Yes, sir.

Q. You have a set routine that you go through in checking identification cards against the signature, do you not? A. Yes, sir.

Q. Did the card that was exhibited to you contain a signature of the person named Wendell Ware? A. It did.

Q. It had his signature right on the card, did it? A. Yes, sir.

Q. And did you observe that signature?

A. I compared it with the signature on the check, sir.

Q. And you must have been satisfied with the resemblance or you wouldn't have taken the check?

A. Yes, sir, I was. The picture and signature were identical.

Q. Do you recall now about what time of the day this person came to your place?

A. I would say it was approximately 4:30 to 5:00 o'clock in the afternoon.

Q. Of a Saturday? A. Yes, sir.

(Testimony of Helen Burnett.)

Q. And did he order his whiskey and beer before he asked to cash the check or afterwards? [95]

A. No, he asked me first if I would cash the check.

Q. Then you must have been standing in front of the establishment?

A. I was standing at the cigar counter by the safe.

Q. Was there a bartender on duty also?

A. Yes, there was a bartender farther on down the bar.

Q. There were a number of payroll checks presented that week-end, were there not?

A. Yes.

Q. Quite a number?

A. Yes, on holiday week ends there usually is.

Q. Did you observe this person sign the check himself?

A. Yes, I did. I stood in front of him and waited for him to sign it so I could compare the signature.

Q. Did you observe how he signed it or any peculiarities about his signature or the method used to sign it? Was he right handed or left handed?

A. I believe he was right handed, sir.

Q. I see. And was he standing just across the counter from you?

A. Yes, he was.

Q. And did he use your pen or did he have a pen of his own?

A. He used my pen.

Q. How was he dressed?

(Testimony of Helen Burnett.)

A. He was dressed in working clothes with a hard hat. [96]

Q. With a hard hat? A. Yes.

Q. Do you recall the kind of clothes he had on?

A. He had on the usual construction men's clothes. Heavy duty type clothes, you would say.

Q. Well, woolen plaid shirt, say?

A. I believe he had on a sweat shirt, sir.

Q. Sweat shirt? A. I think it was.

Q. And what is a hard hat? You mean a helmet, construction——

A. Yes, the type that many of them are required to wear.

Q. You observed this man pretty closely, didn't you?

A. I observe most of my customers that way.

Q. Do you remember them all that well?

A. Not all of them. Specific instances remind you of specific people.

Q. You happened to remember this particular instance very well? A. Yes, sir.

Q. Well, Mrs. Burnett, you were over in the courtroom yesterday, weren't you?

A. Yes, sir, I was.

Q. And Mr. Plummer asked you to come over, did he not, or someone in his office?

A. Yes, sir. [97]

Q. You were subpoenaed in this case?

A. Yes, I was.

Q. Were you told to look for Mr. Smith or Mr. William—Wendell Ware?

(Testimony of Helen Burnett.)

A. I was told that he should be in the courtroom.

Q. You were told he should be in the courtroom?
A. Yes, sir.

Q. Is that all you were told?

A. Yes, sir.

Q. Is that all?

A. Well, I was told what proceedings would take place, that I would be put on the witness stand and asked questions.

Q. You were just told that Smith or Wendell Ware would be in the courtroom, is that all?

A. Yes, and that I would be asked to identify him.

Q. You would be asked to identify him?

A. Yes, sir.

Q. And were you asked if you thought you would be able to identify him?
A. Yes, I was.

Q. And were you? What did you say?

A. I told them I thought that I could. I identified him in a police line-up sometime ago.

Q. They did go ahead, however, and tell you exactly where he would be sitting, didn't they? [98]

A. Not that I recall, no, sir.

Q. Not that you recall?
A. No, sir.

Q. Don't you want to tell the court and jury everything in that respect? Answer my question fairly now. Did they tell you where he would be sitting?

A. No. They told me that he would be sitting in the courtroom as a spectator.

(Testimony of Helen Burnett.)

Q. Did they tell you where he would be sitting?

A. No. They moved several times while I was there, sir.

Q. Who moved?

A. Well, there was a recess of the court.

Q. Now, to get back to my question, Mrs. Burnett. Didn't they tell you just where Mr. Smith would be sitting when you were over there?

A. Not exactly, no. They told me he would be in the courtroom.

Q. I see. Well, not exactly, but did they tell you approximately where he would be sitting?

A. I believe they told me he would be sitting on the same side as the counsel were sitting.

Q. And you believe they told you that. Well, they did tell you that, didn't they?

A. They told me he would be in the courtroom probably on the side of the counsels. [99]

Q. And didn't they show you a diagram, rough layout of the courtroom——

A. No, I asked——

Q. Pardon me. (continuing) ——at approximately where the counsel and the parties would be sitting?

A. Before I went up I asked them how the court was situated in the Elks Hall because I am aware or acquainted with the building and they explained to me how the deal was set out.

Q. Well, how did they happen to mention to you that Smith would be sitting in there behind counsel?

(Testimony of Helen Burnett.)

A. I wouldn't know, sir, how those things are brought up.

Q. Well, you must have asked where he would be sitting?

A. I asked them the layout of the court and they explained to me he would be there or possibly behind counsel's table.

Q. That was in response to your request and they gave you the information that you wanted, didn't they? A. Yes, sir.

Q. As a matter of fact, Mrs. Burnett—rather, I will ask you this: Did Mr. Plummer give you that information in his office as to the layout in the courtroom? A. No, he did not.

Q. Was it Mr. Duggar? Do you know him by name?

A. I don't believe I saw Mr. Duggar yesterday.

Q. Was it Sgt. Laird here?

A. No, it wasn't. [100]

Q. Someone in Mr. Plummer's—

A. It was one of the boys that were instructed to tell me where to go and what time. I believe his name is Anderson, isn't it?

Q. Mr. Anderson?

A. I believe that is his name, yes.

Q. Now, after you arrived in the courtroom yesterday—that was yesterday morning, wasn't it?

A. No, that was yesterday afternoon.

Q. And about what time did you arrive there? Right at 2:00 o'clock when the court—

(Testimony of Helen Burnett.)

A. I arrived just as you were picking the final alternate witness.

Q. Did you have occasion to confer with Mr. Anderson there in the courtroom or Sgt. Laird?

A. I don't remember. I think it was over in Mr. Plummer's office.

Q. Well, I am speaking now of the courtroom after you came there shortly after 2:00?

A. No, I conferred with no one there.

Q. Did any one of Mr. Plummer's staff or his assistants point out to you then at that time where Mr. Smith was sitting? A. No, they did not.

Q. You had only the instructions that were given you in [101] the office as to where he would be sitting? A. Yes, sir.

Q. Did they tell you how he would be dressed?

A. No, I don't recall that they did.

Q. Well——

A. They asked me if I was sure I could identify him and I said yes. He has a very distinctive face.

Q. I didn't ask you that. I asked you if—didn't you have some doubt? Didn't you ask a question that would cause them to say, "He is going to be sitting right behind counsel"?

Mr. Plummer: I object to the question as having been asked and answered at least four times in the cross examination.

The Court: Well, this is cross examination. The court must afford counsel reasonable latitude. I

(Testimony of Helen Burnett.)

will permit counsel to ask this once more. You may proceed.

Mr. Nesbett: Thank you, your Honor.

Q. (By Mr. Nesbett): Didn't you ask the question of Mr. Plummer or his assistants that would cause them to take the trouble to explain to you the courtroom layout in the Elks Club and where Smith would be sitting?

A. Yes, sir, to the extent that I have told you. I asked them how the courtroom was layed out and where I would have to [102] go and they in turn explained to me where the counsels tables were and how the seating was and that Smith would undoubtedly be sitting behind counsels table.

Q. Your main question was only what is the courtroom layout and they took the trouble to explain to you exactly where Smith would be sitting, is that right?

A. No, they didn't tell me exactly where Smith would be sitting.

Q. They told you he would be sitting behind counsel, however, is that right? A. Yes, sir.

Q. Now, didn't you talk with Sgt. Laird or someone in that courtroom after you got there after 2:00 o'clock yesterday and before the witnesses were asked to leave concerning Mr. Smith's location?

A. No, I did not.

Q. You talked with the other witnesses who were with you about it?

A. I came in alone, sir.

Q. But you were sitting with the other wit-

(Testimony of Helen Burnett.)

nesses? A. No, sir, I was sitting alone.

Q. Didn't you talk——

A. Until my husband came in.

Q. Did you talk to Mr. Barton when you were in there?

A. I talked with Mr. Barton out in the ante-room after we [103] were excluded from the courtroom.

Q. And you both checked on who Smith would be at that time, didn't you?

A. Yes, at that time.

Q. You didn't——

A. We had already been excluded from the courtroom.

Q. Did you take any other of these M-K checks over that week-end? A. Yes, sir, one more.

Q. One other one? A. Yes, sir.

Mr. Nesbett: I believe that is all, your Honor.

Mr. Hepp: I have no questions.

The Court: Mr. Kay.

Cross Examination

Q. (By Mr. Kay): Mrs. Burnett, you are pretty sure about the time? It was late in the afternoon on Saturday? A. Yes, it was.

Q. Wouldn't have been any earlier than 4:00 o'clock Saturday afternoon?

A. I don't believe it would have been any earlier probably [104] than 3:30 because I don't usually start working until that time on Saturday afternoon.

(Testimony of Helen Burnett.)

Q. No earlier than 3:30 Saturday afternoon?

A. Yes, sir.

Mr. Kay: Thank you.

The Court: Any redirect?

Mr. Plummer: Just one question.

Redirect Examination

Q. (By Mr. Plummer): Mrs. Burnett, is there any doubt in your mind that this is the gentleman that passed the check in your establishment on that date?

Mr. Kay: Object as leading, suggestive, highly improper.

The Court: Objection overruled.

Mr. Plummer: Would you read back the answer. I thought I heard you answer. Would you answer the question?

A. There is no doubt in my mind. That is the gentleman.

Mr. Plummer: Thank you. I have no further questions.

The Court: Any recross? If not, then you may step down. Thanks for coming. You may be excused.

(Thereupon, the witness was excused and left the stand.) [105] * * * * *

February 24, 1958

Proceedings

* * * * *

Mr. Plummer: I ask that the Bailiff then call Mr. Edward Harkabus.

EDWARD J. HARKABUS

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

Q. (By Mr. Plummer): Would you please state your name, sir?

A. Edward J. Harkabus, H-a-r-k-a-b-u-s.

Q. You anticipated my next question.

The Court: Thank you; that's very important to the Court Reporter and In-Court Deputy as well as the Court.

Q. (By Mr. Plummer): Where do you live, sir? A. Fairbanks, Alaska.

Q. Now, do you know the Defendant in this case, Charles Edward Smith? A. I do.

Q. Now, did you have the occasion to see the Defendant Charles Edwards Smith on March 17, 1957? A. I did.

Q. And would you be good enough to tell us where you saw him? [108]

A. King County Jail in Seattle, Washington.

Q. And do you recall about what time of the day it was?

A. Roughly around two—two-thirty in the afternoon.

Q. And do you recall what day of the week that was? A. That was on a Sunday.

Q. And did you see him by yourself, or was there somebody with you when you saw him, or somebody with you?

A. I was present, Mr. Smith was present, Lt.

(Testimony of Edward J. Harkabus.)

William Trafton of the Territorial Police and Chief—or, excuse me, Special Deputy U. S. Marshal, Ted Pass was also present.

Q. And was there anybody else present at the time? A. For part of the time, yes.

Q. Did you have an occasion to interview him on that occasion? A. Yes, I did.

Q. And did he make any statements to you regarding his participation of the Morrison-Knudsen check swindle over the Labor Day weekend in 1956?

Mr. Nesbett: I will object to that and ask permission of the Court to approach the bench.

The Court: Motion granted.

(Thereupon, the following proceedings were had out of the presence of the Jury:)

Mr. Nesbett: Your Honor, I object to questioning along these lines, while the Defendant was in custody at the time. I notice an attempt to introduce the statement, after the answering [109] of this question, I assume, and the statement would be the best evidence, and I want to hear him on the statement because I have reason to believe, I have strong reason to believe that the statement was taken under grounds that would cause it to be inadmissible on the ground coercion was taken before he was arraigned and on a promise——

The Court: Very well, the Court then in conformance with the Rules and Practice will excuse the Jury and will try the admissibility or inadmissibility of the statement.

(Testimony of Edward J. Harkabus.)

Mr. Nesbett: Could the hearing be held in chambers, or with the spectators out of the courtroom? I know that it's very difficult, as your Honor realizes, by not keeping the jurors from the hallway, it will not keep from them any of the proceedings and——

The Court: Well, I am concerned about excluding all spectators on the Constitutional ground of a public trial.

Mr. Hepp: If I may say a word, as far the Defendant Wright is concerned, I will waive his rights. In fact, he will personally waive his right to have a public hearing in the sense that that word is used in connection with the hearing on the statement.

The Court: Will you waive that, also, as to your Defendant, Smith?

Mr. Nesbett: Yes.

The Court: Mr. Kay? [110]

Mr. Kay: Yes, we will waive the Constitutional provision. I do feel that, along with Mr. Nesbett, no matter how hard the Jury tried, I am sure they're all conscientious, it's hard, very hard, for them not to hear gossip and for that reason, I would feel it would be wise to excuse the jurors at this time, so it can be done.

Mr. Plummer: With all due respect to counsel, if it's a Constitutional right to have a fair and public trial, I do not think they can waive it adequately.

Mr. Hepp: I submit to the Court, the Defend-

(Testimony of Edward J. Harkabus.)

ant can waive any right that is his right.

Mr. Plummer: I am sure the cases will show otherwise.

Mr. Nesbett: I am informed, your Honor, that Judge Forbes occasionally holds these in chambers and that is all I know is just hearsay on it. Did you tell me that?

Mr. Hepp: I have never attended a chambers hearing on this question, however——

The Court: Well, I would not, regardless of Judge Forbes or anybody else, I would not want to hold it in chambers.

Mr. Kay: I'd rather have it in open court, too. Facilities are better, including the Court Reporter, and I think it would be crowded in chambers anyway because you have all the Defendants there and as of right, they'd have to be there.

The Court: Yes, as of right. Mr. Plummer, it appears to the Court—now I'd like to have each one of the Defendants [111] come to the bench and state that they will waive their right to a public trial; then, if that is done——

(Thereupon, the Defendants all approached the bench.)

The Court: Mr. Wright, your counsel, Mr. Hepp, states that on this proceeding to determine the admissibility or inadmissibility of the statement of one Mr. Smith, that you will waive your right to a public trial and we will exclude all the spectators for this purpose only; and you understand, Mr. Wright, if this is done, you could not use this

(Testimony of Edward J. Harkabus.)

matter on appeal in the event that it becomes necessary for you to appeal, or if you do appeal?

Mr. Wright: What do my counsel think of it?

Mr. Hepp: Yes, waive your right.

Mr. Wright: Yes, I will.

Mr. Ing: I have the instruction and I will waive that right.

The Court: You understand you couldn't use that on appeal?

Mr. Ing: Yes.

The Court: Mr. Smith, your counsel has indicated that you will waive the right to a public trial for a portion of the case to determine the admissibility or inadmissibility of your statement. Now, I am pointing out to you if you waive this right then you cannot use it as a ground for appeal, you understand that, in the event you desire to appeal? [112]

Mr. Smith: Yes.

The Court: And you do waive that then?

Mr. Smith: Yes.

The Court: Very well, then. Thank you.

(Thereupon, the following proceedings were had in the presence of the jury:)

The Court: For the reasons stated at the bench, the jurors may be excused to go to their jury room and the Court at this time will have to excuse all people in the general courtroom. The only people allowed in the general courtroom will be the Defendants, their counsel, and of course, none of these defendants (indicating Defendants Walker, Taylor

(Testimony of Edward J. Harkabus.)
and Williams)—they're all under bond, aren't they?
And, of course, Mr. Laird may stay in conformance
with the prior rule.

Very well, ladies and gentlemen of the Jury, you may be excused to go to the juryroom. I don't know how long it will take. We may complete it before lunch; we may not. I can't assure you at this time and in the meantime, the Court expects all spectators in the courtroom to absent themselves from the courtroom and the bailiff is instructed to keep all visitors from coming in on this facet of the case.

(Thereupon, the jurors were excused to go to the juryroom and the spectators retired from the courtroom, after which the following proceedings were had:)

The Court: Let the record show all spectators and [113] jurors have been excluded from the courtroom and the only people present are the three defendants, their counsel and the District Attorney, Mr. Laird—or, Sgt. Laird of the Territorial Police, and the court personnel, plus the witness, Mr. Harkabus. You may proceed.

Q. (By Mr. Plummer): Mr. Harkabus, what was your employment over the Labor Day weekend of 19—or,——

The Court: Pardon me, I am sure counsel will not object if I ask for my Law Clerk to come in during this hearing?

Mr. Kay: No, that will be fine.

(Testimony of Edward J. Harkabus.)

The Court: Mr. Gearlings may come in, Mr. Johnson. Now, you may proceed.

Q. (By Mr. Plummer): Would you be good enough, Mr. Harkabus, to tell me what your employment was on March 17, 1957?

A. I was Special Agent with the National Board of Fire Underwriters.

Q. You were not employed by the Government?

A. I was not.

Q. Now, I will ask you if whether you saw the Defendant on March 17, 1957 in the jail in Seattle in the company with—did you say Smith, Pass and Trafton, and yourself? A. That is right.

Q. Now, did you have an interview with him on that occasion? [114] A. I did.

Q. And did he, during the course of your interview, did you mention the Morrison-Knudsen check swindle over the Labor Day weekend in 1956, here in Anchorage? A. I did.

Q. And did Mr. Smith make some statements to you about it? A. He did.

Q. And now, during the course of this conversation, did anybody else come into the picture?

A. There was a Seattle Attorney by the name of John Harris, a former Assistant United States Attorney who was present during a portion of this interview with Mr. Smith.

Q. And was he there for the purpose of representing anybody? A. He was.

Q. Who? A. Mr. Smith.

Q. And subsequent to your interview, and sub-

(Testimony of Edward J. Harkabus.)

sequent to the time that Mr. Harris was there, did you cause the statements, made by Mr. Smith, to be reduced to writing? A. I did.

Q. Did you do that yourself?

A. I did that myself.

Q. And after they were reduced to writing, did you then show them to the Defendant Smith?

A. I did. [115]

Q. Did he read them?

A. He did read them and they were read to him.

Q. And subsequent to that, did you do anything with the statement that you had typed?

A. He signed it. He signed each page with his signature in my presence and I signed it.

Q. Now, this was after he had seen his attorney Richard Smith?

A. That's correct—I believe not Smith—Harris, John Harris.

Q. I'm sorry. I became confused; and I think I got you confused.

Mr. Plummer: I at this time ask that this be marked for identification.

The Court: It may be marked as Government's Exhibit No. 20 for identification, only.

Mr. Plummer: May I show it to the witness before showing it to counsel, just to have him identify it. This is the statement he typed up that day.

The Court: You may do so.

(Testimony of Edward J. Harkabus.)

(Thereupon, the witness was handed the document.)

Q. (By Mr. Plummer): Will you look this over, Mr. Harkabus and tell me what it is, if you know—the item which you now have, which has been marked for identification, only, as Plaintiff's Exhibit No. 20.

A. This is the four-page statement which I typed for Mr. Smith's signature. I recognize it from my own signature on there and from the contents of the statement. [116]

Q. Thank you, Mr. Harkabus. Let the record reflect I am now showing the statement to counsel.

The Court: For my information, Mr. Plummer, how many more witnesses will you call in regard to this statement?

Mr. Plummer: If necessary, I will call, possibly one, two, three, maybe four. It all is depending on the Court's ruling when the objection is made, if in fact an objection is made.

Mr. Kay: Would it be proper for us to inquire who they are?

The Court: Here is what I was getting at. It's been the practice of the Court to hear all witnesses you intend to call during this "out-of-the-hearing-jury" proceeding, and then thereafter, of course, they would be called again. I was trying to gauge my time is why I asked that question.

Mr. Plummer: I am probably optimistic, but I think that the objection which counsel are about to make will be overruled to the extent the hearing

(Testimony of Edward J. Harkabus.)

will be very, very limited, but in the event the objection is sustained, then I will probably call four witnesses, two of which will be very, very short.

The Court: Well, counsel, out of fairness to the Court, I should like to hear more than one witness. That does not impune Mr. Harkabus in any manner, whatsoever; it's just a question of corroboration.

Mr. Plummer: Two of the witnesses I am going to call will be for the purpose of showing that the other witnesses that [117] were there are not available and Mr. Trafton is in fact in Japan at the present time and Mr. Pass who was also present is in a Federal Hospital down in the South someplace.

The Court: Well, will you have then a witness to corroborate Mr. Harkabus' statements?

Mr. Plummer: The witnesses that I will have—the two witnesses that I will have will be to show that subsequent to arraignment—if I may pursue this while we're talking—subsequent to arraignment, both here and at Seattle, that Mr. Smith, the Defendant, did as a matter of fact, say that the statement was true and further, that he made that statement to the police officers and took them out and showed them different places he went to, mentioned in the statement, and further, that he then went to——

Mr. Nesbett: If he is going to call witnesses to that effect, I'd say the best evidence is the testimony of those witnesses.

Mr. Plummer: That is the reason I am trying

(Testimony of Edward J. Harkabus.)

to be helpful to the Court in response to the Court's question. I am answering the Court.

Mr. Nesbett: I realize that, your Honor, yes.

The Court: Well, I am concerned. Are you going to call another witness who was there at the same time as Mr. Harkabus?

Mr. Plummer: There are no other witnesses available.

The Court: What about this Mr. Harris, the attorney? [118]

Mr. Plummer: I guess he is probably down in Seattle, but he is not under Government subpoena.

The Court: Well, thank you. There is nothing we can do but proceed, I suppose.

Mr. Nesbett: Well, your Honor, I know I will be reading this until noon (indicating the Government's Exhibit No. 20). Maybe your Honor could be guided accordingly as far as the jury and the Court are concerned.

The Court: It appears to the Court, Mr. Plummer, that we best take our lunchtime recess in light of that. I have a number of matters set down for 1:30. I wonder if we shouldn't ask the jurors to come back at 2:30 in the event we may have covered this problem satisfactorily to the Government?

Mr. Plummer: To the Government, yes.

Mr. Nesbett: I don't think that will be time enough. Did your Honor mean to commence this trial at 1:30?

The Court: No, 2:30.

(Testimony of Edward J. Harkabus.)

Mr. Nesbett: I would say 3:00 o'clock at the earliest.

The Court: Will you please call the jurors down so the Court can properly instruct them?

(Thereupon, the Court Bailiff left the courtroom to bring the jurors back into the courtroom, after which, the following proceedings were had in the presence of the jury:)

The Court: Let the record show all the jurors are back and present in the courtroom. Ladies and gentlemen, this matter [119] is going to take considerable time to develop and determine; therefore, the trial of this case will be continued until 2:00 p.m. this afternoon, but you are excused until 3:00 p.m. this afternoon. As you know, I must instruct you at this time not to discuss this case among yourselves, nor are you permitted to let others discuss it with you. You may now be excused and this Court will go into recess until 1:30.

(Thereupon, at 12:00 o'clock a.m., February 24, 1958, the court continues the cause to 2:00 o'clock p.m. of the same day.)

(At 2:00 o'clock p.m., February 24, 1958, counsel for Plaintiff being present and counsel for the Defendants being present, the trial of said cause was resumed and the following proceedings were had, out of the hearing of the jury and the spectators:)

The Court: You may proceed, Mr. Plummer.

Q. (By Mr. Plummer): Thank you, your Honor. Was it your testimony, Mr. Harkabus,

(Testimony of Edward J. Harkabus.)

that you were present at all times and in fact typed up the certificate marked for identification as Plaintiff's Exhibit No. 20? A. It is.

Mr. Plummer: May I approach the witness, your Honor?

The Court: You may.

(Thereupon, Mr. Plummer approached the witness.) [120]

Q. (By Mr. Plummer): And was it your testimony this morning, sir, that before the statement was typed and signed by Mr. Charles E. Smith, that he had an attorney come there to help him?

A. Yes.

Q. Now, was there at any time any threat made to Mr. Smith? A. No.

Q. Was there at any time any promise made to Mr. Smith? A. No, sir.

Q. Now, would you tell me, if you know, that the—if the Defendant Smith was arraigned on this charge down in Seattle? A. He was.

Q. And do you know the date he was arraigned?

A. March 18, 1957.

Q. Now, subsequent to the arraignment, did you—or, prior to arraignment, did this Defendant waive extradition?

A. I was informed that he had, yes.

Q. Well, did you return to the Territory of Alaska with this Defendant? A. Yes, I did.

Q. And do you know what date that was?

A. It would have been the 21st day of March, 1957.

(Testimony of Edward J. Harkabus.)

Q. And did you ride on the same plane with him? A. I did.

Q. And could you tell us, if you recall, how you were seated in [121] the plane?

A. Well, a portion of the time, as I recall, I sat adjacent to the Defendant, Mr. Smith, and we engaged in conversation at that time.

Q. That would be two-abreast, sitting, and you were seated with him? A. Yes, sir.

Q. Did you talk to him about the contents of the statement at that time?

A. We mentioned it, yes.

Q. And do you recall what his statements were in regard to the statement?

Mr. Nesbett: I will object to that. After all, we are only concerned with one thing at the moment and that is this particular statement that was written and is being offered in evidence, as I understand it.

The Court: That is correct, Mr. Plummer.

Mr. Plummer: This conversation has to do with this statement that we are offering in evidence now, Plaintiff's Exhibit No. 20, your Honor.

The Court: Well, would it go to the admissibility or inadmissibility of that statement?

Mr. Plummer: I think it probably would go to the admissibility of it if it does get in. Of course, the Jury is gone—if the court thinks—— [122]

Mr. Nesbett: I will withdraw the objection.

The Court: There is nothing before the Court. You may proceed.

(Testimony of Edward J. Harkabus.)

Q. (By Mr. Plummer): Tell me what he said in regard to the statement at that time?

A. I asked him if he knew any more than he had incorporated in his statement, if he had any additional details, and he said no, that as far as he could recall that this was in fact what had happened in his participation in the M-K check deal.

Q. And you made no threats or promises to him on that occasion? A. I did not.

Q. Now, do you recall whether or not this Defendant was arraigned after he got back to Anchorage on the same charge?

A. I was informed that he was, but I don't know of my own knowledge.

Q. I would ask the Court to take notice of its own files, look at the Held To Answer papers which will show that this Defendant was arraigned in Commissioner's Court, advised of his rights by Commissioner Warren Colver on March 21, 1957, at Anchorage.

The Court: The Court will take judicial notice then of its own records.

Mr. Plummer: Thank you, your Honor.

The Court: You may proceed. [123]

Q. (By Mr. Plummer): And, following the date I just mentioned, did you have an occasion to see this Defendant in my office? A. I did.

Q. And who else was present, if you know?

A. Mr. Pass and yourself.

Q. And what, if anything, did I do at that time

(Testimony of Edward J. Harkabus.)

with regards to this Plaintiff's Exhibit No. 20 that you had in your hand?

A. Well, my recollection is that you went over the statement here where—and it was reaffirmed by the Defendant, Mr. Smith, and additionally——

Q. Did I have a conversation with him?

A. Yes, you did.

Q. And would you tell me what that conversation was?

A. Well, the conversation was to the effect “do you have any additional knowledge other than that contained in the statement concerning the M-K check scheme”.

Q. And do you recall what the Defendant's answer was?

A. He said, “no, sir; it's all in the statement”.

Q. And did we have any further conversation at that time and place in your presence?

A. Well, my recollection is that the Defendant indicated to you at that time that he wanted to plead guilty to this charge and to begin service of his sentence immediately so he'd get it over with.

Q. Yes, sir. Now, did you have occasion to see the Defendant at a later time? A. I did.

Q. And would you tell us when that was, sir?

A. That would have been March 27, 1957.

Q. And would you tell us where that was?

A. It was Territorial Police Headquarters.

Q. And will you tell the Court who was present during that time you saw him, at the time you saw him?

(Testimony of Edward J. Harkabus.)

A. At the time I saw him, at the Territorial Police Headquarters, Officer Ed Dankworth, poly-graphic examiner for the T. P. was there, where we had an interview with Mr. Smith concerning another matter.

Q. Was there any conversation about Plaintiff's Exhibit No. 20 at that time? A. There was.

Q. And would you tell us what that was, sir?

A. Well, in effect, Mr. Smith reiterated the veracity of the statement at that time.

Q. And did you have occasion to see him on another time in the company with anybody else?

A. Well, that same date that I have mentioned, on March 27th, I was with Mr. Smith and Sgt. Laird of the Territorial Police and Mr. Pass, I believe, and we used the statement; we went over the statement in detail to attempt to ascertain the [125] places that had been visited by Mr. Smith during the course of his passing the bogus checks and the subsequent actions of Mr. Smith when he got rid of the merchandise that he had picked up during the course of this swindle, check swindle, and Mr. Smith, at that time, was very cooperative in attempting to show us the various locations of the roads and so forth, but it was rather difficult inasmuch as I believe there was still snow on the ground, or something to that effect, but we did go around to the various places that are indicated in this statement.

Q. Now, did—were any threats made to him on that occasion? A. No, sir.

(Testimony of Edward J. Harkabus.)

Q. Were any promises made to him on that occasion? A. No, sir.

Mr. Plummer: I have no further questions to ask this witness. I will ask leave of court however, that after the cross examination—after he has been excused, if the Court finds it necessary, I will want to recall him to—after we have elicited all the information on it.

The Court: For that purpose, you may do so. You may proceed, Mr. Nesbett.

Cross Examination [126]

Q. (By Mr. Nesbett): Mr. Harkabus, when was the first date that you first saw Mr. Smith?

A. The first date that I saw Mr. Smith would have been approximately March 15th of 1957. I may have seen him in Fairbanks prior to that time, but I had no reason to see him.

Q. In connection with this case, it was approximately March 15th of 1957, is that right?

A. That's right, sir.

Q. And was that in Seattle?

A. That was in Renton, Washington.

Q. In Renton. Are you sure that was the 15th; you said "approximately", and I was wondering if you could be certain that it was that?

A. I am certain it was that.

Q. What day of the week was it?

A. The 15th I believe was a Friday.

Q. And where did you see Mr. Smith on that date, first?

(Testimony of Edward J. Harkabus.)

A. Well, where I saw him was at his residence at 11815 - 78th South Avenue, Renton, Washington. Mr. Smith—I was in the vehicle of the King County Sheriff's Office.

Q. I just asked you where you saw him; you have answered the question.

A. All right, sir.

Q. Did you have occasion to go into the residence at that [127] address you recited?

A. I did not. (The witness answered simultaneously and prior to the completion of the question.)

Q. Will you wait until I finish the question before you attempt to answer it? Mr. Harkabus, did you attempt to go into the residence at that address? A. No.

Q. Did you ever go into the residence at that address? A. No, sir.

Q. Who was with you on that occasion?

A. It was Lt. Wayland of the King County Sheriff's office and Special Deputy Marshal Ted Pass, Lt. William Trafton—

Q. Well, Lt. Trafton was a member of the Territorial Police in Alaska, was he not?

A. Yes, sir.

Q. And Mr. Pass was a member of the Anchorage Police force, is that right?

A. Well, my information was that he was a Special Deputy U. S. Marshal, Mr. Nesbett.

Q. I see, and you were Special Deputy for the Fire Underwriters?

A. No, I am Special Agent with them.

(Testimony of Edward J. Harkabus.)

Q. Special Agent? A. Yes, sir.

Q. And Wayland was with the Sheriff's Office there?

A. King County's Sheriff's office. [128]

Q. You all three traveled in the same car to the address in Renton, didn't you?

The Court: You——

A. We did.

The Court: You mean all four, don't you, counsel?

Q. (By Mr. Nesbett): All four, excuse me—including the Sheriff's Deputy—all four of you traveled to that address in Renton?

A. Yes, sir.

Q. And did any one of you four have a warrant for Mr. Smith's arrest?

A. I believe that Mr. Pass had the warrant.

Q. You believe that he had it. Did you see it?

A. Yes, I did.

Q. You saw it? A. Yes, sir.

Q. And what did the warrant indicate the reasons were for arresting Mr. Smith?

A. Well, I believe it was for forgery, offhand. I didn't look at it in detail. In fact, my recollection is that I just saw it in a passing glance.

Q. What were you doing with that group anyway? Aren't you ordinarily concerned with fire losses and such?

A. Fire losses and other losses, Mr. Nesbett.

Q. And are you ordinarily connected with crime investigation [129] other than arson?

(Testimony of Edward J. Harkabus.)

A. Yes.

Q. How did you happen to be with these three officers on that date?

A. I happened to be with them because I was conducting another investigation and I desired to interview Mr. Smith and the reason that I was with them was that there was a Marshal's party that was leaving from Fairbanks and that I was sent out as a guard for them.

Q. So that put you in Seattle, is that right?

A. That's right.

Q. And you were investigating another matter and you wanted to go along with these officers on that day to see Mr. Smith?

A. That is right.

Q. Now, to get back to the warrant, did you actually see and read the warrant?

A. I didn't read it, no.

Q. Did Officer Pass ever show it to you?

A. Yes, he did.

Q. And where did he show it to you?

A. Well, I believe that I saw it when he—I am not sure of this point, now I believe he read it to Mr. Smith. If it wasn't at Mr. Smith's residence, I believe that he read it to him at the King County Jail, or, the Sheriff's Office, rather, not the King County Jail. [130]

Q. You went into the residence then, didn't you?

A. No, I didn't go into the residence.

Q. You didn't go into the residence at all?

A. No, sir.

Q. What preliminary steps were taken by the

(Testimony of Edward J. Harkabus.)

King County Sheriff's Office with respect to determining whether or not Mr. Smith was at home at that address on that date?

A. I believe that Lt. Wayland radioed to the dispatcher at King County and requested that he make a pretext call to Mr. Smith to ascertain whether or not he was home at that time.

Q. And it was determined that Mr. Smith answered the telephone so the officers then went up to the door of the residence, isn't that right?

A. Yes, sir.

Q. And where were you?

A. Well, I was by the vehicle in the drive-way.

Q. And rather short, fifteen to twenty feet from the door, were you?

A. Well, in actuality, there was no door. It was boarded over was my recollection of it.

Q. The door was boarded over?

A. I believe so; that was in the front portion.

Q. Where did they go, to the rear door?

A. I assume they did.

Q. Did you get out of the car at all? [131]

A. I got out of the car, yes.

Q. Did you walk toward the rear door?

A. Well, I was near the car. I mean, I may have walked toward the front fender, but I mean, as far as entering, if that is what you are implying, why, I didn't.

Q. Well, don't be concerned with what I am implying, just answer the question. Where did you go when you got out of the car?

(Testimony of Edward J. Harkabus.)

A. I got out of the car and I was in the driveway, Mr. Nesbett.

Q. Well, were you standing next to the car or away from the car?

A. I was standing adjacent to the car.

Q. You could see the doorway from where you were standing?

A. Yes, sir.

Q. The three other officers went to the doorway, did they?

A. No, they went to the rear of the house.

Q. Well, there was a door there, wasn't there?

A. Where?

Q. There was a door at the rear of the house, wasn't there?

A. Well, I don't know if there was or not. I would assume there was.

Q. Well, you said you could see them from where you stood. Now, could you see a door or not?

A. I said I could see the door from where I stood.

Q. All right, the three officers went to the door, did they not? [132]

A. Not to the door I could see. They went up to the driveway beyond my range of vision.

Q. When—then you couldn't see how or where they entered that house, is that your testimony?

A. Yes.

Q. Did you overhear anything that occurred before they entered?

A. No.

Q. You didn't overhear a thing. How far were

(Testimony of Edward J. Harkabus.)

you from the point where they entered the house, if you can estimate?

A. Well, if I don't know where they entered the house, it would be hard for me to tell you that.

Q. Well, don't argue with me. Can you tell me yes or no? Can you judge that distance or not?

A. Will you repeat?

Q. Can you estimate that distance from where you were standing to where they entered the house?

A. Well, I could estimate the distance toward the rear end of the driveway.

Q. All right. How far is that?

A. Maybe fifty feet.

Q. Fifty feet? A. Something like that.

Q. Then you were fifty feet from the door at the time the three officers disappeared from your view, is that about it?

A. That is about right. [133]

Q. And they disappeared in the direction of the house so that the entrance would be somewhere beyond fifty feet from you, is that right?

A. I would say so, offhand.

Q. You — did you overhear anything they said before they entered?

A. No, sir, not to my recollection, I didn't.

Q. Did you overhear Mrs. Smith say that "Charles Smith is not here"? A. I did not.

Q. You didn't hear anything else? (Pause.) You heard the Sheriff — King County Sheriff's Officer announce his identity?

(Testimony of Edward J. Harkabus.)

A. I am sure he identified himself; I believe I did hear that.

Q. You did hear that?

A. I believe I heard it.

Q. And did you hear him ask if Mrs. Smith—if Charles Smith was there?

A. No, sir, I didn't.

Q. Well, didn't you listen after you heard the first remark?

A. Well, I am not even positive that I heard it. I would assume that he did announce his identity. That's the only——

Q. You know, as a matter of fact, Mr. Harkabus, that Mrs. Smith, the Defendant's mother said, "he's not here", and that the officer brushed her aside and went straight on in the house, [134] don't you? You don't want to admit it?

A. I do not, Mr. Nesbett.

Q. You don't know that? A. No.

Q. You overheard a part of the conversation; you heard the officer announce his identity, didn't you?

A. I said I believe that I did, yes.

Q. Well, you wouldn't believe that you heard it unless there was some good basis in your memory for thinking that you had heard it, would you?

A. I have already answered your question; I believe that I heard it, Mr. Nesbett.

Q. But you didn't hear another thing that occurred there?

(Testimony of Edward J. Harkabus.)

A. I didn't hear the conversation that you have outlined to me, no.

Q. What did you next see or hear?

A. I believe that he came—that they came out with the Defendant, Mr. Smith.

Q. You believe that they came out with him?

A. Yes, sir.

Q. Well, they did, didn't they?

A. Well, they did in fact.

Q. And is that the next thing you observed after you had heard the officer announce his identity at the door?

A. As far as from where I was, yes. [135]

Q. Who had Mr. Smith in custody of those three officers? A. I believe Mr. Pass did.

Q. And was he handcuffed?

A. I don't recall.

Q. Was Mrs. Smith to be seen yet at all, the Defendant's mother?

A. I never did see Mrs. Smith.

Q. You never did? A. No, sir.

Q. Are you sure you didn't go in that house?

A. I am positive.

Q. But you saw a warrant that Officer Pass had?

A. Well, my recollection was that he showed me the warrant. I can't remember whether it was prior to the time or later at King County Jail. Now, that is what I said.

Q. You aren't sure whether he had a warrant at that time or not, are you?

(Testimony of Edward J. Harkabus.)

A. I am pretty sure he did, or he wouldn't be arresting him.

Q. You hoped he had, but you are not sure?

A. I didn't necessarily "hoped" he had.

Q. You didn't see it prior to their entering the house on that day, did you?

A. Well, I previously testified that I thought that I had——

Q. Well, if you saw——

A. (Continuing) ——and I am trying to——

Q. Go ahead. [136]

A. I am trying to remember exactly. It's been a little while ago, but——

Q. If you saw it later at the King County Jail—can you remember now where the warrant issued, out of which or whose jurisdiction?

A. I believe it was out of Anchorage, out of this Court.

Q. Out of this Court? A. Yes, sir.

Q. And that it was a warrant for the crime of forgery? A. I believe that's right.

Q. You believe that's right?

A. Uttering a false instrument, or something to that effect. I didn't arrest Mr. Smith, so I'd have no idea why or what the full charge is.

Q. I realize that. I am just trying to find out what you remember, if anything. Now, what was done with Mr. Smith by the officers and yourself.

A. Well, he was transported then from his residence there to King County Sheriff's Office.

Q. About what time of day was that?

(Testimony of Edward J. Harkabus.)

A. I'd estimate that we arrived at Mr. Smith's residence around 3:30 or somewhere thereabouts.

Q. Can you estimate approximately when you arrived at the King County Jail?

A. Well, I don't know the exact distance to Renton, but I [137] do recall that we were slowed up quite a bit because of Boeing traffic which apparently has a shift change at that time and just on the assumption that it was around 3:30, I believe it would have been perhaps around 4:30; maybe not that long, maybe half an hour or something like that. I don't know how far it is, actually, to Renton.

Q. Probably 4:30 when you arrived at the King County Jail, approximately?

A. Just roughly I'd say, yes.

Q. What was done then with Mr. Smith, if you know?

A. I believe he was interviewed by Mr. Pass and Mr. Trafton.

Q. Where was the interview conducted?

A. It was at King County or the King County Sheriff's office.

Q. You were present too, weren't you?

A. I believe that I only asked Mr. Smith a couple of questions at that time and he indicated that he didn't have any knowledge of that, so that I wasn't present if you mean throughout the interview, no, sir.

Q. Well, were you present at the commencement of the interview? A. Yes.

Q. And did you ask your questions concerning

(Testimony of Edward J. Harkabus.)

the matter you were investigating before the other officers——

A. No, sir.

Q. (continuing) ——commenced their investigation?

A. No, sir. [138]

Q. Who commenced the investigation or interview first, which officer?

A. I believe Mr. Pass did.

Q. I see. How long was Mr. Pass engaged in his interview?

A. Well, after Mr. Pass told the Defendant that he didn't have to make a statement and that he was entitled to the services of an attorney, he went in and began to ask him about his participation, alleged participation, of the M-K check deal and I can't recall how long I was in the room—maybe half an hour.

Q. Then did you have an opportunity then to ask your questions?

A. Yes, I did. I told him that I didn't have too much interest in this other matter and that I wanted to ask him these questions if I could.

Q. Did you ask him?

A. I did.

Q. And did he answer?

A. He answered.

Q. And did you then leave?

A. I left the room, yes.

Q. You left the room. Was the Defendant and the other officers still there?

A. Yes, sir.

Q. The other officers were still interviewing, is that your recollection? [139]

A. Yes, sir.

Q. Did you go back in that interview room that

(Testimony of Edward J. Harkabus.)

day? A. I may have been in there later, yes.

Q. You may have? A. Yes.

Q. Well, don't you recall whether you went in there later or not?

A. Yes, I do recall and I don't believe I re-entered the interview room. I was in the chief deputy's office is my recollection.

Q. Was that the—adjacent to the interview room?

A. Well, it's down the hall from it, yes.

Q. As a matter of fact, didn't you remain in that interview room until late at night, until Mr. Smith finally signed the consent to be extradited?

A. No, sir.

Q. You did not? A. No, sir.

Q. Would you say then that after you arrived at King County Jail, that you left the interview room at approximately 5:00 o'clock or thirty minutes after you got there?

A. I'd say that that is about right, yes, a little after five.

Q. And that you never returned to the interview room that evening?

A. Well, I may have ducked in there or out; I am not sure of that. [140]

Q. Did you take any part in the interview after you had asked your questions?

A. After I left, I don't believe that I did, no, sir.

Q. You don't believe that you did. Is your recollection hazy on that point?

(Testimony of Edward J. Harkabus.)

A. Not particularly.

Q. Now, you have testified, I believe, that Officer Pass informed the Defendant that he was entitled to counsel? A. Yes, sir.

Q. And that he need not make a statement?

A. Yes, sir.

Q. Well, did he come right out and say right at the commencement of the interview, "now, you don't have to make a statement"?

A. He did. He informed him that he didn't have to make it; that he could have the services of an attorney.

Q. You remember that? A. I do.

Q. Very well? A. Yes.

Q. Was the Defendant sitting down or standing up at that time? A. He was sitting.

Q. Where were you in the room with relation to the Defendant?

A. I would have been to the left of him, I believe.

Q. Weren't you sitting at a desk in the room?

The Court: Well, it was a long table what I recall. [141]

Q. (By Mr. Nesbett): You were sitting at the table, weren't you?

A. I wasn't—if you mean was I sitting directly in front of the Defendant, Mr. Nesbett—

Q. Were you sitting at the table, first?

A. I was at the table, yes.

Q. And the Defendant was close by you, was he? A. No.

(Testimony of Edward J. Harkabus.)

Q. Sitting at the table, also?

A. Well, I believe he was on the other side.

Q. Was Lt. Pass standing or sitting?

A. He was sitting.

Q. Were those relative positions maintained for approximately the thirty minutes that you were in there?

A. I believe they were.

Q. All right, now, did you see Mr. Smith again that day that you remember as Friday the 15th, after you had once left the interview room?

A. I don't believe that I did, no.

Q. Mr. Smith hadn't admitted any implication or connection with this M-K matter as of the time you left that room, had he?

A. No.

Q. He had not, had he?

A. No.

Q. Now, when did you next see Mr. Smith?

A. I next saw him on the 17th.

Q. That would be on a Sunday, would it not?

A. Yes, sir.

Q. At about noon?

A. No, I believe it was after that. I had previously testified it was somewhere around 2:00 o'clock, as I recall.

Q. Well, it was afternoon then?

A. Yes, sir.

Q. And who was with you on that occasion and where did you see him?

A. I saw him at King County Jail. Lt. Trafton was with me and Officer Pass.

Q. And are those the only persons?

A. Yes, sir.

(Testimony of Edward J. Harkabus.)

Q. And did you use the same interview room that had been used the day before?

A. No, sir.

Q. Another room?

A. It was another section of the same building but he had been incarcerated in the jail underground.

Q. Over night, he had been in jail over night?

A. Yes, sir.

Q. Now, was the interview continued with Mr. Smith? A. Continued, yes.

Q. Who conducted the interview? [143]

A. Well, there were three of us present and I believe we all took a part in the interview.

Q. Didn't you, Mr. Harkabus, carry the main part of the interview as far as the officers were concerned?

A. I believe that you might say that I did, yes.

Q. You were seated at a table, weren't you, and Mr. Smith was somewhat on your left at the same table? A. Uh-huh.

Q. And Lt. Pass was sitting down to Smith's left, somewhat? A. Well——

Q. Is that about right?

A. Well, no, I believe that Special Deputy Pass was across the table from me and that would have put him on Smith's left.

Q. Smith's left, and Trafton was standing up, wasn't he? A. I believe he was.

Q. And that those were the only persons pres-

(Testimony of Edward J. Harkabus.)

ent when the interview was commenced on Sunday, is that right? A. Initially, yes.

Q. Initially, yes. Now, what was the nature of the interview as far as you were concerned and as far as you participated on that Sunday? Was it in connection with this M-K matter or the matter that you were interested in?

A. Well, it was a little of both.

Q. A little of both? A. Yes, sir. [144]

Q. And was it during that interview that Mr. Smith admitted connection with this M-K thing?

A. Yes, sir.

Q. Now, approximately, how long after he had been in the interview room was it that he made an admission?

A. I believe it was around, roughly, forty-five minutes, something like that.

Q. Now, during that forty-five minutes, were you, yourself, making notations of anything that Mr. Smith was saying? A. I was, yes.

Q. You were making penciled notations, weren't you? A. Yes, sir.

Q. I'll ask you, during that interview, didn't the jailer have occasion to announce that Mr. Smith's attorney was there and wanted to see him?

A. He did.

Q. And did you not tell the jailer "the attorney can see him when we get thru with him"?

A. I did not.

Q. You did not? You deny that, specifically?

A. I do, specifically, and vehemently.

(Testimony of Edward J. Harkabus.)

Q. Right. Now, what happened then after the jailer announced that Mr. Smith's attorney was there?

A. There was some conversation as to whether or not we should continue the interview and I suggested that we let him see [145] his attorney. That was my suggestion.

Q. There was some conversation between whom?

A. Well, Mr. Pass said that he—the jailer initially came up and said when they're booked as a Federal prisoner, something to the effect that their policy at King County was that they didn't let them in unless they—it was all right with the officer or something to that effect, but——

Q. Well, now, don't go too fast and get us confused. The jailer said there was a policy in connection with Federal prisoners, is that right?

A. Yes.

Q. And that policy was what, as you recall it?

A. He stated that——

Q. That is the jailer stated? A. Yes.

Q. Go ahead?

A. He said that, in effect, that unless they wanted to let the attorney in that he was a Federal prisoner or something to that effect and——

Q. We'll stop there. Unless he wanted to let the attorney in——

A. That he didn't have to, something——

Q. The jailer didn't have to? A. Uh-huh.

Q. Is that the way you understood him to remark? [146]

(Testimony of Edward J. Harkabus.)

A. That is the way I took it. I don't know whether that is right, but that is the way I understood——

Q. Well, what—if you know, why did the jailer come and tell you fellows that?

A. I don't know why he did that.

Q. He said, "there is an attorney out here that wants to see the Defendant", is that right?

A. That's right.

Q. And then he went on to state that, "there is a policy in connection with Federal prisoners that I don't have to let their attorney in if I don't want to", is that right? A. Something to that effect.

Q. Something to that effect. Well, you didn't want to see the attorney, did you?

A. Not particularly.

Q. Now, you went on with the interview, didn't you? A. Yes, for a few minutes.

Q. For approximately twenty—twenty-two—twenty-five minutes, didn't you?

A. Well, my recollection is that the interview had bogged down at that point and Mr. Pass went to discuss this matter with Mr. Harris, the attorney, and we were more or less holding the interview in abeyance until he came back.

Q. You had, up to that time, been writing down some things Mr. Smith had been telling you, hadn't you? [147]

A. Yes, sir.

Q. In longhand? A. Yes, sir.

Q. You had Mr. Smith almost to the point where

(Testimony of Edward J. Harkabus.)

you thought he was going to sign something, didn't you? Now, just be honest with us.

A. I am trying to remember. Will you ask the question again, please?

Q. You had Mr. Smith at that time almost to the point where you thought he might sign something for you, didn't you?

A. Well, he had already admitted his complicity in the check case.

Q. Well, to get back to the question, you had him to the point where you thought he was almost ready to sign this thing you had been writing on, didn't you?

A. Oh, no, sir, because no one can read my notes. I didn't anticipate him signing that at all.

Q. Well, did you continue to prepare notes and interview Mr. Smith after the first announcement by the jailer?

A. Well, Mr. Pass had talked to the attorney is my recollection, and I don't know what he did say to him, but the attorney did come in.

Q. Well, didn't you hear him talk with the attorney? A. No, sir.

Q. And you stayed with Mr. Smith, did you, while Mr. Pass was [148] talking to the attorney?

A. Lt. Trafton and I were there with Mr. Smith.

Q. Talked with the attorney?

A. No, Mr. Nesbett, Mr. Pass talked to the attorney; Lt. Trafton and I were with Mr. Smith.

Q. Stayed with the Defendant?

A. Yes, sir.

(Testimony of Edward J. Harkabus.)

Q. But you couldn't overhear anything that Mr. Pass said to the attorney, is that right?

A. No, sir, I didn't.

Q. Did the jailer come in any more and make any more remarks about the Defendant's attorney being around?

A. He came in again and said the attorney was still there and I suggested that Mr. Harris come in; that they let Mr. Harris come in and talk to Mr. Smith inasmuch as he was the attorney.

Q. Was that after Pass had been out to see him?

A. Yes, sir.

Q. After Pass went out to see him, the attorney did not come back in, did he? The attorney did not follow Pass back in the room, did he?

A. Yes, he did.

Q. Well, what was the occasion for your suggesting that he allow Mr. Harris to come in then?

A. Well, I thought it was a good idea, that's all.

Q. But if Pass was bringing him in and you didn't overhear what [149] was occurring between Pass and the attorney, why was your suggestion that you made that he be brought in?

A. Well, one of us is confused, Mr. Nesbett, and possibly it's me, but my point was that, initially, Mr. Pass had talked to the attorney and what the conversation was, I don't know. Mr. Pass came back and subsequently, the jailer indicated that the attorney was there and then I stated, "I think it's a good idea for you to let him see him".

(Testimony of Edward J. Harkabus.)

Q. All right. Now, when Mr. Pass came back, the attorney was not following him in?

A. He was.

Q. He was? A. On the second occasion.

Q. On the second occasion? A. Yes, sir.

Q. Did Pass go back out and get the attorney after you suggested that it would be a good idea to bring him in? A. I believe he did.

Q. Well, then what was the occasion for the jailer coming back the second time?

A. Well, you will have to ask the jailer; I don't know.

Q. You don't know? A. No, sir.

Q. Mr. Harkabus, didn't it occur about like this: that during this interview the jailer came and said, "there's an attorney [150] here who wants to see this Defendant", and did you not reply to the jailer, "he can see him when we get thru with him"?

A. I have answered your question previously.

Q. Well, answer yes or no. A. No.

Q. Did the jailer not come back a second time after that and say, "this man's attorney wants to see him, and it's my belief that he has a right to see his attorney"? A. No, sir.

Q. And that you again answered he can see him when we get thru with him? A. No, sir.

Q. You did not? A. No.

Q. And that the next thing that occurred was that the jailer had the attorney standing in the door?

(Testimony of Edward J. Harkabus.)

A. That is not my recollection at all.

Q. You don't recall it that way?

A. No, sir.

Q. Well, it was about twenty minutes after the attorney was first announced that Mr. Pass brought him in then, is that your testimony?

A. That's right.

Q. He got just as far as the door, didn't he—the attorney got just as far as the door, didn't he?

A. What door?

Q. The door entering into the interview room.

A. He was within the door; he had entered the room.

Q. He just got inside the door, then?

A. Well, it wasn't—well, I don't know how far he had been in, but he was in the room.

Q. How far in the room?

A. Well, he was within three feet of Mr. Smith, I'd say, offhand.

Q. And how long was he there?

A. Maybe ten minutes or so—fifteen.

Q. Did you talk with the attorney?

A. Did I talk with him?

Q. Yes. A. No, sir.

Q. Did you carry on your interrogation while the attorney was there? A. No, sir.

Q. You dropped that, didn't you? All of the officers dropped their interrogation, didn't they, while the—— A. Dropped it?

Q. You discontinued your interrogation while the attorney was there, didn't you?

(Testimony of Edward J. Harkabus.)

A. Well, the attorney was talking to Mr. Smith, so obviously——

Q. Well, can't you answer that, Mr. Harkabus? You discontinued [152] your interrogation of Mr. Smith while the attorney was there, didn't you? (Pause) You, yourself, didn't ask Mr. Smith any questions while the attorney was in there, did you?

A. I did not.

Q. Nor did any of the other officers, did they?

A. No, sir.

Q. Now, the attorney asked Mr. Smith, "do you want me to represent you?", didn't he?

A. He did.

Q. And what did Mr. Smith say?

A. He asked him who had sent him.

Q. And who did the attorney say had sent him?

A. He said that his father, Oscar Smith, I believe his name is.

Q. Oscar Smith, the Defendant's father had sent him, Harris, down there, is that right?

A. Yes, sir.

Q. And what else was said?

A. When he asked Mr. Smith if there was anything that he could do for him, Mr. Smith replied, the Defendant replied, that he didn't think so because he had in fact been implicated in this situation and had confessed his complicity.

Q. Smith hadn't signed anything as yet, had he?

A. No, sir.

Q. So, the attorney left, didn't he? [153]

(Testimony of Edward J. Harkabus.)

A. There was a few more words between Smith and his attorney.

Q. Well, then the attorney left, didn't he?

A. Yes, he did.

Q. How—did it take ten minutes for all that to occur?

A. Well, that is my recollection.

Q. Did anyone tell Mr. Smith that he could go out and see his attorney in private if he wanted to?

A. His attorney said, "Do you want to talk to me in private, Mr. Smith", and Mr. Smith replied, "no".

Q. Was his attorney sitting down or standing up? A. He was standing up.

Q. And did the jailer make any remark to Smith about his rights?

A. Not to my recollection, no, sir.

Q. Did you tell Smith, "Go ahead, Smith, you can see your attorney if you want to"?

A. No, sir, I didn't.

Q. Did Pass do that?

A. I don't believe so.

Q. Or, did Trafton?

A. No, sir. He had previously been advised of his rights.

Q. Now, after the attorney Harris left, what then happened in the interview room?

A. We continued to interview Smith for a short time.

Q. That went on for probably an hour and a half, or two hours afterwards, didn't it? [154]

(Testimony of Edward J. Harkabus.)

A. I don't believe so, no, sir.

Q. The result of this interview was that Mr. Smith signed some of these things you had been writing out in longhand, didn't he?

A. No, sir.

Q. Now, we get down to the point: didn't you have Mr. Smith sign some of those pages that you were writing on in your own handwriting in longhand? A. I didn't, no, sir.

Q. You didn't? Who did?

A. Nobody did, to my knowledge.

Q. Nobody did? (Pause) Is it your testimony that nobody had Mr. Smith sign something written in longhand there that day in that room?

A. That's my recollection, no, sir.

Q. Well, could anyone have had him sign something written in longhand there at that time without your knowing it? A. I doubt it.

Q. Then, in all probability your testimony is, is it not, that he didn't sign anything written in longhand there that day?

A. My recollection is that he did not.

Q. How did this statement that has been offered as Exhibit 20 get to be typewritten?

A. I typed it.

Q. Where did you type it? [155]

A. In the King County Sheriff's office.

Q. When?

A. Immediately after the interview with Smith.

Q. Was Mr. Smith with you at the time you typed it? A. I don't believe he was.

(Testimony of Edward J. Harkabus.)

Q. Did you do all the typing yourself?

A. Yes, sir.

Q. Was officer Pass and Trafton with you when you typed it? A. They were.

Q. And that would be the same day, Sunday?

A. Yes, sir.

Q. And when was it taken to Mr. Smith—was it taken to him? A. Yes, sir, it was.

Q. Where was he when it was taken to him?

A. I believe he was in the jail.

Q. The three of you took it to him up to his cell? A. No, not to his cell.

Q. Did you call him out of his cell?

A. I didn't, no, but he had been called out.

Q. Where was he called down to—where was he called?

A. He was called to the same place where the interview was conducted, there.

Q. And about what time of the day would that be? A. I honestly don't know.

Q. Well, would it be late in the evening? [156]

A. No, sir.

Q. Early in the evening? Was it before you had had dinner?

A. Oh, yes; in fact, it was in the afternoon.

Q. In the afternoon? And it was signed in the same interview room then, was it, that you had been in previously that afternoon, with Mr. Smith?

A. I believe so, Mr. Nesbett.

Q. Did you say that you had read the statement over to Mr. Smith? A. Yes, sir.

(Testimony of Edward J. Harkabus.)

Q. Did you read it in its entirety to him?

A. Yes, sir.

Q. And I believe you also testified that he, himself, read it? A. Yes, sir.

Q. Did he read it over page by page?

A. I am sure that he did, yes, sir, because he initialed several corrections on it.

Q. Were you there watching him to see that he read it all? A. Yes, sir.

Q. Have you still got those notes you made?

A. That's a difficult question to answer for this reason: that recently, I was involved in a fire in Fairbanks, your Honor, where many of my records and what-have-you were water-damaged and fire-damaged and, very honestly, I don't know; it may be in salvage records, yes, sir. [157]

Q. Well, you don't know whether your notes were destroyed in that fire or not, is that right?

A. That's right.

Q. Didn't you—don't you, as a rule, turn your notes in with your—with the statement?

A. Well, generally, I don't, no, sir.

Q. To whom did you give the statement then after it had been signed?

A. Well, it was given to Trafton and Pass.

Q. Did you keep a copy for yourself?

A. No, sir, I don't.

Q. And you don't know what happened to your notes?

A. Well, I am not sure of what happened to them, Mr. Nesbett.

(Testimony of Edward J. Harkabus.)

Q. I am looking at Exhibit 20 for identification, Mr. Harkabus—I wonder if I could see the original? My photostat doesn't show very well. May I approach the witness, your Honor?

The Court: Yes, you may.

(Thereupon, Mr. Nesbett approached the witness.)

Q. (By Mr. Nesbett): Now, Mr. Harkabus, is this the statement that you typed, Exhibit 20?

A. Yes, sir.

Q. You typed that yourself?

A. Yes, I did.

Q. And you say you had Mr. Smith sign each page of it himself? [158]

A. Yes, sir. I didn't have him sign it; he signed it.

Q. He signed it? A. Yes, sir.

Q. And in the presence of Trafton and Pass?

A. Yes, sir.

Q. Now, this was taken on a Sunday—that would be the 17th? A. Yes, sir.

Q. Do you know how the date 3/16/57 came to be written on the copy of this statement?

A. Do I know how?

Q. Yes. A. No.

Q. Where is that copy (talking to other defense counsel)? On the photostat that I got off the copy, there is handwritten the date "3/16/57".

Mr. Plummer: I don't think I have anything on that.

Q. (By Mr. Nesbett): I am showing you a

(Testimony of Edward J. Harkabus.)

photostatic copy of Exhibit 20 which was made during the noon hour, Mr. Harkabus. Do you see those figures up in the righthand corner "3/16/57"?

A. Yes, sir.

Q. Do you recall those figures being written in on any copy of this Exhibit 20?

A. I do not.

Q. You have no idea how they might have gotten there? [159]

A. You have the original. That is the one I typed. I know nothing about the photostat, Mr. Nesbett.

Q. The point I am making, Mr. Harkabus, this is a photostat copy that was given to us by the District Attorney and the figures are photostated as well as the typing. I was wondering if you knew how——

A. No, sir.

Q. How many statements were signed by Mr. Smith on that date?

A. I believe there might have been three copies.

Q. Of four pages each? A. Yes, sir.

Q. And did you have him sign all three copies?

A. I believe he did sign all copies, yes, sir.

Q. And you deny vehemently, didn't you say, that he signed any of your handwritten statements or notes?

A. My testimony was that I don't recall that he signed any notes. I don't recall him signing my notes.

Q. Didn't you have him sign your notes, or what you had been writing out shortly after attor-

(Testimony of Edward J. Harkabus.)

ney Harris had left the room and then later take these others in and tell him that they were just typewritten copies of the statement he had already signed? A. Oh, no, sir.

Q. You didn't? A. No, sir. [160]

Q. Do you recall Officer Pass, during the interview on Sunday speaking to Mr. Smith and saying "you better make a statement"?

A. No, sir.

Q. You don't recall that early part of the interview? A. I don't recall it.

Q. Do you recall Officer Pass later saying, "if you go ahead and make the statement it will go a lot easier with you"?—just prior to Mr. Harris being announced?

A. Well, my recollection of anything along that line is this, Mr. Nesbett:—

Q. Well, I'd like to have you answer that question.

A. Will you rephrase your question?

Q. I will have it read back to you.

(Thereupon, the Court Reporter read back the question on Page 161, Line 6.)

A. Your Honor—

The Court: This is cross examination. You should answer the question yes or no.

A. Well, I'd say "no" then.

Q. (By Mr. Nesbett): Why did you hesitate?

A. Well, I hesitated because that isn't what was said.

(Testimony of Edward J. Harkabus.)

Q. What did Officer Pass say to him in connection with making a statement?

A. Officer Pass indicated to him that based on past experience, [161] in the event that he made a statement and a full confession, undoubtedly, it would go easier with him". That was the full context of the remark made by Officer Pass.

Q. That is the context of what Officer Pass said, is that right?

A. I believe that is right, sir.

Q. In other words, he said that, in gist, as best you recall?

A. Yes, sir.

Q. You don't recall exactly what he said, do you?

A. No.

Q. You do not?

A. No, sir.

Q. Mr. Harkabus, now, going back to Saturday afternoon at about 4:45, about fifteen minutes after you had arrived at the King County jail, or approximately that time——

The Court: Pardon me. My understanding was, it was on a Friday.

Mr. Nesbett: I'm sorry, your Honor, that is right; the testimony was Friday. I am glad your Honor reminded me.

Q. (By Mr. Nesbett): Are you sure it was a Friday or Saturday?

A. It was a Friday.

Q. It was a Friday?

A. Yes, sir.

Q. Did you see Mr. Smith at all on a Saturday?

A. I did not, no, sir. [162]

Q. All right. Now, on Friday afternoon, at about 4:45, or approximately fifteen minutes after

(Testimony of Edward J. Harkabus.)

you had arrived at the King County jail, you were in the room with Mr. Smith, that is right, isn't it? A. Yes.

Q. And you had an opportunity to ask him two or three questions, is that right?

A. I asked him several questions.

Q. And then you left the room, is that right? Approximately half an hour after you had gone in?

A. Well, it may have been longer. I am not positive.

The Court: What's the purpose of going all over this the second time, counsel?

Mr. Nesbett: Just laying the groundwork for one question, your Honor, that has been suggested to me and I couldn't ask the question out of the blue.

The Court: I appreciate that, but on the other hand, I thought I had the right to determine why you were going over that again.

Mr. Nesbett: Yes, sir.

Q. (By Mr. Nesbett): Now, so after you had been in the room approximately thirty minutes, you left, is that right, Mr. Harkabus? A. Yes, sir.

Q. And to the best of your recollection, you didn't go back, did [163] you?

A. I don't believe I did, no, sir.

Q. And you don't know what happened or how long they were in the room, after you left, do you?

A. Well, they weren't in there too long. I do know that, because Lt. Wayland had to close his office.

(Testimony of Edward J. Harkabus.)

Q. How do you know whether or not they were in there very long after you left?

A. Well, I was still at the King County jail. I testified to that, that I was in another room, in the chief deputy's room.

Q. Well, all right. If you are so aware and informed of the situation, how long were they in there after you left? A. I don't know.

Q. You don't know?

Mr. Nesbett: That is all.

The Court: Very well. Any redirect, counsel?

Redirect Examination

Q. (By Mr. Plummer): When did you next see——

Mr. Kay: Could I have a chance on cross? I just wanted to ask one question along that line?

Cross Examination

Q. (By Mr. Kay): On Saturday then, I don't want to be repetitious at all, you didn't see Smith at all on Saturday? A. I did not.

Q. Do you know whether Pass and Trafton did?

A. I believe they did.

Q. You don't know how long they saw him or what was said, of course, not being there on Saturday? A. I wasn't there.

Mr. Kay: All right.

Mr. Plummer: Anybody else?

The Court: Now, you may proceed then.

(Testimony of Edward J. Harkabus.)

Redirect Examination

Q. (By Mr. Plummer): Did you, in fact, see Officer Pass and Lt. Trafton after you had left the cell or the interrogation room, or the Defendant Smith after they were conducting their investigation on Friday afternoon?

A. I saw them, yes, sir. [165]

Q. When did you see them?

A. I am not absolutely sure of the time, but I believe it would have been around six or so.

Q. And where? A. 6:30—around 6:30.

Q. Where did you see them?

A. Well, I believe it was in the office of Lt. Wayland of King County Sheriff's office.

Q. So, they were at least out of there by the—about the time you mentioned?

A. I believe they were.

Q. Now, did Mr. Nesbett show you this copy with the "3/16/57" on it? A. He did.

Q. And it was your testimony you didn't know anything about it?

A. I didn't know anything about the photostat at all.

Mr. Plummer: I have no further questions.

The Court: Very well, you may step down.

Mr. Nesbett: May I ask one question, your Honor? It wasn't elicited by the redirect. I was wondering if your Honor would give me permission to ask it in any event. It's based on the direct testimony.

The Court: Yes. [166]

(Testimony of Edward J. Harkabus.)

Recross Examination

Q. (By Mr. Nesbett): Mr. Harkabus, I believe you said the Defendant was arraigned in Seattle, did you? A. Yes.

The Court: No.

Q. (By Mr. Nesbett): Did you say that——

Mr. Nesbett: I understood him to say he was.

A. He was.

Q. (By Mr. Nesbett): Well, that is where I was confused. He was arraigned in Seattle?

A. He was arraigned in Seattle.

Q. And on what day?

A. I believe it was the 18th.

Q. Were you present at the time?

A. I was—I believe the Commissioner requested——

Q. Were you present when——

A. Yes, sir.

The Court: To refresh your recollection, Mr. Nesbett, the testimony was he was arraigned here in Anchorage, before Warren Colver.

Mr. Nesbett: On March 21st? [167]

The Court: Yes.

Mr. Plummer: There was also testimony, your Honor, that he was arraigned, by this witness, that he was arraigned in Seattle on the 19th.

The Court: I didn't hear it.

Mr. Nesbett: I believe I better clarify——

The Court: Well, the record will speak for itself. It was my recollection that he was——

Mr. Plummer: After arrival back to Anchor-

(Testimony of Edward J. Harkabus.)

age, but he was arraigned in Seattle. I believe the witness testified he was arraigned on the 19th of March in Seattle, prior to his departure from Seattle.

Q. (By Mr. Nesbett): Was that a Monday?

A. It was a Monday.

Q. That would be the 18th. Which Commissioner was he arraigned before?

A. John Burns, U. S. Commissioner in Seattle.

Q. John Burns? A. Yes, sir.

Q. You were present? A. Yes.

Q. Was the—was any charge read to the Defendant? A. Yes.

Q. What was the charge? [168]

A. Uttering a forged instrument, I believe.

Q. There was a Complaint then in existence at that time?

A. I believe there was, Mr. Nesbett.

Q. That Complaint was read, was it?

A. Yes, sir.

The Court: He was represented by an attorney at that time?

Q. (By Mr. Nesbett): Harris was there then, wasn't he? A. Yes, sir.

Q. And had extradition already been taken care of?

A. At that time, my recollection is that Mr. Smith's attorney, John Harris, made a motion to quash the waiver of extradition, executed by Mr. Smith.

Q. Was the motion argued?

(Testimony of Edward J. Harkabus.)

A. It was set for the 19th at 1:30 p.m.

Q. And when was the waiver of extradition signed? You were present when that was signed, weren't you?

A. No, sir.

Q. Weren't you?

A. No, sir.

Q. Well, did Pass and Trafton take care of that?

A. I assume that they did.

Q. That was done on a Saturday, wasn't it, the day you weren't there? [169]

A. Well, I don't know. I believe it was. Efforts were made to arraign him on that same date, according to Mr. Pass.

The Court: Now, what same date?

A. On the—it would have been on the 16th, your Honor.

The Court: I see.

A. I don't know that of my own knowledge. All I know is what I was informed.

Mr. Nesbett: That is what I was going to ask. I ask that it be stricken and your Honor disregard it. It's strictly hearsay. If Pass can take the stand and say that under oath, all right.

The Court: You asked the question, did you not?

Mr. Nesbett: No, I didn't; your Honor did.

The Court: Read the record back.

(Thereupon, the Court Reporter read back Line 24, Page 169 thru Line 7, Page 170, inclusive.)

The Court: The Court didn't ask the question, you see.

(Testimony of Edward J. Harkabus.)

Mr. Nesbett: Very well.

The Court: Let's take a recess. We have been in session well over an hour now. I would suggest, Mr. Johnson (the Court Bailiff), that you have the jurors come in and take their places in the courtroom. How long do counsel think this might go on?

Mr. Plummer: We have two short witnesses and one witness that will be fairly lengthy and not as lengthy as Mr. Harkabus, [170] however.

The Court: Well, now as to the fact that Mr. Pass and Lt. Trafton aren't here, won't counsel stipulate that they're not here and available?

Mr. Nesbett: Stipulate that they're not here?

The Court: Well, no, that they're not available.

Mr. Kay: I don't know that they're not available. The United States Attorney's office can subpoena a witness anywhere in the United States. I don't know whether they're inside the jurisdiction or not.

The Court: I don't know either, but I was hoping to conserve time on that basis. If you won't, of course, we will have to go along with it, but I assume that something of that nature you would know of your own knowledge and you'd be willing to stipulate to it.

Mr. Nesbett: I don't know, your Honor, and I am certainly not in a position to waive anything.

The Court: Very well, Court will go into recess for a period of ten minutes.

(Testimony of Edward J. Harkabus.)

(Thereupon, following a short recess, the following proceedings were had, out of the hearing of the jury and the spectators:)

The Court: Were you thru with this witness, Mr. Nesbett?

Mr. Nesbett: Yes, your Honor.

The Court: Very well. Mr. Kay? [171]

Recross Examination

Q. (By Mr. Kay): Just a few questions, your Honor. Mr. Harkabus, this proceeding in Seattle that occurred on Monday there, are you sure that was an arraignment or is it possible that it was a hearing on this question of extradition or something? A. It was an arraignment.

Q. Do you recall if the bond was set?

A. It was \$10,000.00, at my recollection.

Q. Was there a Complaint there present in Seattle that was read at that arraignment?

A. I believe there was, Mr. Kay.

Q. Were you present throughout the proceeding?

A. I was in the back portion of the Commissioner's Court. They indicated that they wanted us up there and I didn't know exactly— (pause)

The Court: You may continue, Mr. Kay.

Q. (By Mr. Kay): You are, of course, aware of the difference between an arraignment and a— or, know what an arraignment is, do you not, Mr. Harkabus? A. Yes, I do. [172]

Q. From where you were standing in the court-

(Testimony of Edward J. Harkabus.)

room, could you hear everything that went on in regard to the proceedings?

A. I believe I could hear it.

Q. Can you recall what went on?

A. It was an arraignment; that is my recollection and the bond was set and the Defendant was informed of his rights and so forth. He was represented by an attorney at that time, Mr. Kay.

Q. And that attorney immediately raised the question, did he not, of extradition, and made this motion to quash the waiver of extradition that had previously been signed? A. He did.

Q. And a date was set the following day or two days later for a hearing on that motion?

A. It would have been the 19th which was the subsequent date at 1:30 p.m.

Q. And then it's your testimony that the Defendant was again arraigned here in Anchorage?

A. Well, that—I think that your best record would be your Commissioner of Court records.

Q. You don't know of your own knowledge whether he was arraigned again?

A. I'd been informed that he was, yes, sir.

Q. But of your own knowledge?

A. No, sir. [173]

Q. Then you wouldn't be aware of any reason why he would be arraigned twice, if he was in fact arraigned twice? A. No.

Q. Where did this proceeding take place? Was it in the same building as the jail?

A. No, sir.

(Testimony of Edward J. Harkabus.)

Mr. Kay: That is all the question I have.

The Court: Mr. Plummer, any redirect?

Mr. Plummer: No, your Honor.

The Court: Mr. Hepp?

Mr. Hepp: No questions.

The Court: Very well, then, you may step down, Mr. Harkabus. You may call the next witness.

Mr. Plummer: I would ask that the Court take judicial notice of its own files and see that on the Held To Answer papers that a Complaint was filed against this Defendant on March 14, 1957 and that the warrants did issue on that date.

The Court: Very well, motion is granted.

Mr. Kay: Just to satisfy my curiosity, would the court file there also reveal the date of an arraignment here in Anchorage, Alaska?

Mr. Plummer: It does reveal.

The Court: You say "it does"?

Mr. Plummer: It does. The Held To Answer transcript that came up revealed what day he was arraigned and by whom. The [174] reason I am sure is because I looked at the Commissioner's copies over the noon hour.

The Court: Mr. Kay, I point out to you that there is a Complaint signed the 14th day of March, 1957 by William T. Plummer and also by Warren C. Colver, Deputy United States Attorney (meaning Deputy United States Commissioner) in the file and bond set at \$10,000.00 on that date, and also——

Mr. Kay: That is a bond endorsed on the Complaint, is it?

The Court: That is correct. Then the commitment pending trial is signed on the 21st day of March; bail fixed at \$10,000.00.

Mr. Kay: Does the transcript here in this file show anything of the arraignment in Seattle?

The Court: Could you help me, Mr. Plummer?

Mr. Plummer: The transcript I saw down in the Commissioner's Court over the noon hour did not mention any arraignment in Seattle.

Mr. Kay: That is all.

The Court: Very well. You may call your next witness.

Mr. Plummer: I'd ask that Jim Barkley be called.

The Court: For the record of counsel it shows that a warrant for Charles Edward Smith was issued the 14th day of March, 1957, and he was arrested at Seattle, Washington on March 15, 1957. That may help you. You may proceed counsel. [175]

JAMES H. BARKLEY

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

Q. (By Mr. Plummer): Would you please state your name, sir? A. James H. Barkley.

Q. Your occupation?

A. Territorial Police Officer.

Q. And where are you stationed, sir?

A. Fairbanks, Alaska.

(Testimony of James H. Barkley.)

Q. Do you know a Lt. Trafton in Fairbanks, Alaska? A. Yes, sir.

Q. And do you know—what is his occupation?

A. He is my commanding officer in Fairbanks detachment.

Q. Do you know where he is at this time?

A. Japan.

Mr. Plummer: I have no further questions.

The Court: You may cross examine.

Cross Examination

Q. (By Mr. Kay): Is he on vacation? [176]

A. Yes, sir.

Q. When did he go?

A. I don't know the exact date. It's been approximately two or three weeks.

Q. You don't actually know, personally, that he is in Japan? I mean, you haven't seen him there? A. No.

Q. You just know he is supposed to be in Japan?

A. That is correct, sir.

The Court: Any other cross?

Q. (By Mr. Nesbett): Is he still employed by the Territorial Police? A. Yes, sir.

Q. Is he coming back to work in Fairbanks, or— A. As far as I know, sir, yes.

Q. Have any charges been placed against him, to your knowledge, within the department?

A. Not to my knowledge, no, sir.

Q. Is he in command of the whole unit in Fairbanks? A. Yes, sir.

(Testimony of James H. Barkley.)

Q. When is he expected back?

A. I don't know for sure what the length of his annual leave. I have heard it's the middle of April.

Q. How much annual leave do you officers ordinarily get with the department, Officer Barkley?

A. It varies; there's nothing—there's no set——

Q. Do you have thirty days of vacation a year or——

A. A year, yes, sir, thirty days annual leave per year.

Q. Has he been—did he leave the department three weeks ago, or, did you say he was in Japan two or three weeks ago the last you heard?

A. Left on his vacation.

Q. Two or three weeks ago? A. Yes, sir.

Q. And he will be back maybe in the middle of April?

A. To the best of my knowledge, yes, sir.

Q. What is his rank? A. Lieutenant.

Mr. Nesbett: I believe that is all.

The Court: Any redirect?

Mr. Plummer: No, your Honor. I will advise the Court that I may call this witness on rebuttal. Of course, there is no way to anticipate, so I will ask that he be out of the courtroom.

The Court: Very well. You may be excused then.

Mr. Plummer: Will you call Mr. Hibpsman?

EARL W. HIBPSHMAN

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follow on [178]

Direct Examination

The Court: You may proceed, counsel.

Q. (By Mr. Plummer): Will you please state your name, sir? A. Earl W. Hibpselman.

Q. Occupation? A. Police Officer.

Q. With the Anchorage City Police?

A. Yes, sir.

Q. What division? A. Detective Division.

Q. Do you know, sir, a Mr. Ted Pass?

A. Yes, sir.

Q. Is he still with the Anchorage Police Department? A. No, sir, he is not.

Q. Do you know about when he severed relations with the Police Department?

A. Yes, sir, October 31, 1957.

Q. Do you know his present whereabouts?

A. I believe he is someplace in North Carolina; I am not sure of the town, no, sir.

Mr. Plummer: I have no further questions.

The Court: You may cross examine. [179]

Cross Examination

Q. (By Mr. Nesbett): When did you last hear of Mr. Pass?

A. Sir, I have not heard of Mr. Pass since three or four days before his dismissal.

Q. How did you happen to know that he is in North Carolina?

(Testimony of Earl W. Hibpshman.)

A. Only by being told; I have seen no correspondence, sir.

Q. Is he confined in a mental institution there in North Carolina?

A. No, sir, that I know of.

Q. Has he been confined in any mental institution since he left the force, to your knowledge?

A. No, sir, not that I know of.

Q. Have you understood or heard that he has been?

A. No, sir.

Q. Do you know why he left the force?

A. Yes, sir.

The Court: Well, that is irrelevant and immaterial. He is not on trial.

Mr. Nesbett: Very well, your Honor.

The Court: Any other cross? You may step down then.

Mr. Plummer: No further questions.

The Court: You may call your next witness.

Mr. Plummer: Call James E. Chenoweth. Just open the door. He is down the Marshal's Office.

JAMES H. CHENOWETH

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

Q. (By Mr. Plummer): Will you please state your name, sir?

A. James H. Chenoweth.

Q. Occupation?

A. Chief Deputy United States Marshal.

(Testimony of James H. Chenoweth.)

Q. I call your attention to, sir, to Criminal No. 3772, entitled United States vs. James Ing and others, and ask you, if you know, if a subpoena was issued for one Ted Pass, formerly with the City Police in regard to this cause?

A. Yes, sir, it was.

Q. And do you know, or, if you know, will you tell us where this subpoena was sent and where it was served, if in fact it was served?

A. We sent the subpoena to the United States Marshal at Raleigh, North Carolina for service upon Mr. Pass at Rocky Mountain, North Carolina.

Mr. Plummer: May I approach the witness, your Honor?

The Court: You may.

(Thereupon, Mr. Plummer approached the witness.)

Q. (By Mr. Plummer): I ask you, sir, if you know whether or not the subpoena was [181] served?

A. The Deputy Marshal at—in the area close to Rocky Mountain, North Carolina went out to serve the subpoena on Mr. Pass. He did not serve it because Mr. Pass is under doctor's care at the present time. He wired the information to us and asked for instructions on the service of the subpoena, advising us in the same telegram that a physician's certificate would be forthcoming.

Q. Is that the telegram that you have there in front of you?

A. Yes, sir, it is.

(Testimony of James H. Chenoweth.)

Q. Unless the Court or counsel want to look at it, or——

Mr. Kay: I'd like to inspect; I am not insisting that—but I would like to examine it.

(Thereupon, the document was inspected by Mr. Kay.)

Q. (By Mr. Plummer): And did you in fact receive such a certificate from the doctor?

A. Yes, we did.

Q. May I once again approach the witness?

The Court: You may do so.

(Thereupon, Mr. Plummer approached the witness.)

Q. (By Mr. Plummer): I ask you, sir, if you can tell me what that is?

A. This is a letter from Dr. Stone which was sent to the United States Marshal at Raleigh, North Carolina, and he in turn [182] forwarded it to us. This is the doctor that has Mr. Pass under his care.

Q. And would you tell us what in effect the letter says?

A. The letter says that Mr. Pass had been under the doctor's care for a period of approximately two weeks; that he had had during that period of time two severe convulsions at home; that he was presently being treated by that doctor with Thora-zine and Dilatin sodium in order to control these seizures and the doctor stated, in his opinion, it would be inadvisable for the witness to undertake a trip to Alaska, at this time.

(Testimony of James H. Chenoweth.)

Mr. Plummer: I don't intend to offer this. I will show it to counsel. If they want me to, I will make such an offer.

The Court: Very well. Any cross examination?

Mr. Nesbett: No questions.

Mr. Kay: No questions.

The Court: Very well. You may step down.

Mr. Plummer: May I give these to Mr. Chenoweth to return to his file?

The Court: They will be available in the event counsel needed them.

Mr. Kay: I wonder if I could just ask Mr. Chenoweth a question as he stands there? [183]

Cross Examination

Q. (By Mr. Kay): Have you been asked to serve a subpoena on Lt. William Trafton?

A. Yes, sir.

Q. Did you make any effort to do so?

A. Yes, sir. Lt. Trafton is either somewhere in Hawaii, Tokyo, or East. He's been on vacation, or, he's taking annual leave for a period of about five weeks and nobody knows exactly where he is.

Q. When were you asked?

A. I'd have to check the records. It was sometime during the normal course of the issuance of subpoenas in this case.

Q. What's that, a week, two weeks, ago?

A. I'd say approximately two weeks ago, anyway, if my memory serves me correctly.

The Court: Any redirect, counsel?

Mr. Plummer: No, your Honor.

The Court: Thanks, Mr. Chenoweth. You may be excused. You may call your next witness.

Mr. Plummer: I'd like to call Stanley Laird.

STANLEY H. LAIRD [184]

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

The Court: You may proceed.

Mr. Nesbett: Your Honor, before he commences to question Officer Laird, I object to any of the testimony; Officer Laird has sat here all through the trial and I don't think it's proper. I don't know what phase of the case or statement he intends to question him on, but I don't think it's proper.

The Court: Objection overruled. He may proceed.

Q. (By Mr. Plummer): Will you please state your name, sir? A. Stanley H. Laird.

Q. Your occupation?

A. Territorial Police Officer.

Q. And you, in behalf of your department, worked this case for the Department of the Territorial Police, is that correct, sir? A. I did.

Q. And I ask you, sir, if you recall right before the noon recess today extracting a copy of a statement allegedly taken from Charles Edward Smith from your file and handing it to defense counsel?

A. I did.

(Testimony of Stanley H. Laird.)

Mr. Plummer: And, may I approach the witness, your [185] Honor?

The Court: You may do so.

(Thereupon, Mr. Plummer approached the witness.)

Q. (By Mr. Plummer): Is this a copy of the statement that you gave him at that time?

A. It is.

Q. I see what appears to be a longhand notation up in the upper lefthand corner of the statement saying "3/16/57". Do you see that?

A. Yes, sir.

Q. Do you know who put that on the original, which is not available now, or on the copy that you gave them?

A. I put it on myself. It was for filing purposes. That was the weekend or so of Pass going to Seattle to locate Mr. Smith.

Q. You had no knowledge of when the statements were actually taken? A. No, sir.

Q. The "3/16/57" did not refer to that in any way? A. No, sir.

Q. Do you know the Defendant in this case, Charles E. Smith? A. Yes, sir.

Q. Did you have occasion, sir, to see him on or about March 27, 1957? [186] A. I did.

Q. And where did you see him, sir? (pause) Where did you see him, sir?

A. I saw him at the Federal Jail. We picked him up, Detective Pass and myself, between 10:20 and 10:30 a.m. of that date.

(Testimony of Stanley H. Laird.)

Q. And what, if anything, did the three of you do?

A. We took Mr. Smith with us and, to substantiate his statement, took him about Anchorage and had him point out the various stores and, where he had left off Mr. Volk, and just going over the points of his statement.

The Court: Counsel, that doesn't have anything to do with the admissibility of this statement, though.

Mr. Plummer: Subsequent to the two arraignments, after; he certainly had been advised of his rights. He now says that the statement is true and it was voluntarily given, if in fact I can elicit from this witness that he did so testify.

The Court: Excepting this, that is not relative to the admissibility of this statement itself. That is the only thing we are trying. It might be to the trial itself, but not to the statement.

Mr. Plummer: My point, your Honor, was, and I probably expressed it very poorly, if sometime after he had been advised of his rights, if he in front of this witness said that the statement was true, (1); and that it was given voluntarily with no threats or promises made to him. That certainly, that would tend [187] to show that at the time the statement was given that condition also existed.

The Court: Well, I anticipate, maybe not rightly, counsel for the defense are going to raise objection

(Testimony of Stanley H. Laird.)

that the statement is inadmissible because he was not timely arraigned; so, therefore, that would have no bearing upon—and I haven't talked to counsel about it. It's just obvious from the testimony, so, whether it was voluntarily, involuntarily, accurate, or inaccurate is unimportant at this point.

Mr. Plummer: Very good, sir. Then, I will probably at this time not waste further time of the court with this witness. I am trying to figure out how I can renew my motion without Mr.—for submission—without Mr. Harkabus being here.

The Court: Well, of course, you could do that without—he's properly identified it now.

Mr. Plummer: All right, I ask that Mr. Laird be excused for the time being then.

The Court: Is there any cross, counsel?

Mr. Nesbett: I was going to ask Mr. Laird a question or two.

The Court: I thought maybe you had——

Mr. Nesbett: As long as it was touched on. [188]

Cross Examination

Q. (By Mr. Nesbett): How, in the course of your filing procedure, Sergeant, would you get—would you have occasion to mark on a report of that nature "3/16/57", such as you mentioned?

A. That was from Ted, sir, Ted Pass' reports and so on and compiling them in the folder is just to get continuity of papers, that's all, just the weekends and so on. I don't know the exact date the statement was taken. In other words——

(Testimony of Stanley H. Laird.)

Q. That is what puzzles me. You couldn't have received it before, say, the 20th, or 21st, could you?

A. No, sir, and the papers were not always—they were held in abeyance and were not—in other words—put in to the folder until we were ready to get the thing in——

Q. Did Officer Pass bring it up to you or did he mail it to you?

A. He gave it to me about a week or so after he returned.

Q. Now, that is the point, Sergeant: how then, a week later, did you happen to write "3/16/57" on that statement?

A. I was just going by his daily report.

Q. Did you read a daily report? Did something in the report give you the idea that it was taken on the 16th?

A. It was just the period of time, sir, just the period of time that he had gone down to Seattle to contact Mr. Smith, or, arrest Mr. Smith. [189]

Q. Well, after you did write "3/16/57" on the statement then, where in your filing cabinets would you put it in order to be able to go back to it with respect to that date?

A. It's in my folder during the month or the week of—everything is listed in dates and by date and it was just as a figure of speech. I just took an arbitrary figure and, assuming it was on or about the 16th. I didn't know.

Q. Didn't you take the figure, though, that rep-

(Testimony of Stanley H. Laird.)

resents the date from Lt. Pass'—from whose records? Traftons?

A. Lt.—or, it was Detective Pass'.

Q. Detective Pass' records; something you saw in his records made you write "3/16/57", wasn't there?

A. I was just assuming, sir; I was just assuming; I didn't ask him. I was filing the papers and getting them in continuity. That was all. The figure didn't mean anything at all.

Q. You have trouble going back and finding your files? A. No, sir.

Mr. Nesbett: That is all.

Mr. Plummer: I have no further questions.

The Court: You may step down. Now, you may call your next——

Mr. Plummer: I, at this time, offer what has been marked for identification, only, as Plaintiff's Exhibit No. 20 into evidence. [190]

The Court: Is there objection?

Mr. Kay: Yes.

Mr. Nesbett: Yes, your Honor, there is objection and I, of course, want to call the Defendant as a witness with respect to the statement.

The Court: Very well, you may come forward, Mr. Smith and take the stand.

CHARLES E. SMITH

called as a witness for and on behalf of the Defendant, and being the Defendant, and being first duly sworn, testifies as follows on

Direct Examination

Mr. Nesbett: As I stated, your Honor, Mr. Smith is being called simply for the purpose of determining the admissibility of this statement and no others.

The Court: That is in conformance with the practice. You may proceed.

Q. (By Mr. Nesbett): Your name is Charles E. Smith, and you are a Defendant in this case, are you not? A. That is right.

Q. And you sat in court here throughout the trial? A. Yes.

Q. Now, were you in Seattle on about March 15, 1957? [191] A. Yes, I was.

Q. Were you arrested on that date?

A. Yes.

Q. Now, will you—about what time of day were you arrested and where were you when it occurred?

A. I was at my folks' house. It's 115 — no; 11815, 78th South, and I would say it was around 3:00 o'clock.

Q. In the afternoon? A. Yes.

Q. Do you recall what day it was?

A. I believe it was a Friday.

Q. Now, state what happened at the place at that time?

A. I was just talking to someone on the phone and there was a knock on the door and my mother

(Testimony of Charles E. Smith.)

answered the door and somebody asked if I was there and she said "no", so they just pushed her aside and came in the house.

Q. Did you know who that was?

A. I learned later it was the sheriff of Seattle.

Q. And did you learn later that his name was Wayland, or Weeland? A. Yes, I did.

Q. Who else was with him?

A. I believe Detective Pass was, or, Marshal Pass.

Q. Do you recall any other persons who were with him? A. No.

Q. Did you see Lt. Trafton? [192]

A. Yes, I did.

Q. Well, was he with the sheriff?

A. Well, they was all together, but the only two to come inside the door was Mr. Pass and that sheriff.

Q. Now, where were you in the house at the time they came in?

A. I was right by the phone.

Q. Did either of those persons make any statement to you when they came thru, past your mother?

A. The sheriff said that I was under arrest.

Q. Did he tell you why you were under arrest or for what? A. No, he didn't.

Q. Did the sheriff show you a warrant?

A. He didn't show me nothing.

Q. Did you—were you ever presented with a warrant? A. No, I wasn't.

(Testimony of Charles E. Smith.)

Q. What happened then?

A. Well, they took me down to Seattle Federal Jail there.

Q. I'll ask you this, before you go on with the story: did you see Mr. Harkabus there at that time?

A. Yes, I did.

Q. Where was Mr. Harkabus?

A. He was with them.

Q. Did he come in the house?

A. Not in the house.

Q. Did he stay outside the house? [193]

A. Yes, sir.

Q. Do you remember which door they came in?

A. They came in the back door.

Q. Was Mr. Harkabus near the back door, or do you know, when they went out?

A. When I come out, they was all right together there, real close.

Q. All right. Where were you taken?

A. Seattle Federal Jail.

Q. Would that be the King County Jail there?

A. I believe it would be.

Q. What was done with you there?

A. Well, I went in this sheriff's office there and Pass and I believe Harkabus and that sheriff was there.

Q. Was Lt. Trafton there?

A. Yes, Lt. Trafton, too.

Q. Are you sure Harkabus was there?

A. He was there right from the beginning.

Q. All right. What happened in this office?

(Testimony of Charles E. Smith.)

A. Well, he started asking me questions about this M-K check deal.

Q. And did you give him any answers to those questions? A. No, I didn't.

Q. How long were you in that office?

A. I'd say around three hours. [194]

Q. And was Harkabus there during that period of time?

A. He was there right at the start.

Q. And how long did he remain there, if you recall? A. Not too long.

Q. Did the others, any of the others, remain after Mr. Harkabus left?

A. Mr. Pass did and Mr. Trafton.

Q. Mr. Pass and Mr. Trafton remained?

A. Yes.

Q. During the entire three hours you say you were there? A. Yes.

Q. What was being said and done in the office during those three hours?

A. They wanted me to sign, I don't know what they call it, but something saying they could take me back up to Alaska.

Q. Well, would it be something to do with extradition? A. Yes.

Q. Does that sound familiar? A. Yes.

Q. Did you sign it?

A. Well, not at first, but——

Q. Did you eventually sign it?

A. I did; right at the end I signed it.

Q. Now, did Mr. Pass or Mr. Trafton or Mr.

(Testimony of Charles E. Smith.)

Harkabus ever talk to you about your right to have an attorney or, in fact, did [195] anything—that anything you said might be used against you?

A. No, they didn't.

Q. During that entire session?

A. No, they didn't.

Q. Are you positive of that?

A. I'm positive.

Q. Did they ask you to sign any written statements other than this extradition paper at that time?

A. No, they didn't.

Q. Did you, during the course of that interview, at the end of that three hours, make any admissions of your connection with the M-K matter?

A. No, I didn't.

Q. Where did you sign this paper in connection with extradition?

A. That was in the sheriff's office.

Q. Was that on the same day you were brought in?

A. Same evening, yes.

Q. About what time in the evening did you sign it?

A. That must have been around 6:00—6:30.

Q. Did you know what you were doing when you signed that paper? Did you know the effect of it?

A. All I know I wasn't going to get no sleep until I signed it, I guess, so I signed it.

The Court: Just answer the question now. [196]

Q. (By Mr. Nesbett): Well, did you know the

(Testimony of Charles E. Smith.)

effect, what they expected to accomplish by getting your signature on that paper?

A. No, I didn't.

Q. Did you — did they mention something about bringing you back to Alaska in connection with the paper?

A. I believe Detective Pass said he was going to bring me back to Alaska.

Q. Did you know that signing that paper would permit him to bring you back without legal proceedings?

A. I didn't then.

Q. You found that out later, did you?

A. Yes.

Q. Now, what—after you signed the paper, what was—what happened to you?

A. They took me back to my cell.

Q. And were you in a cell with other prisoners or alone?

A. I was alone.

Q. And how long were you in the cell there?

A. Well, that night—all that night and next day; I'd say about four days, I guess, altogether, four or five days.

Q. Well, you went in on a Friday, didn't you?

A. Yes.

Q. Were you in a cell all day Saturday the following day?

A. Yes.

Q. And were you taken out at all during that day? [197]

A. Detective Pass and Mr. Trafton, they come and talked to me.

Q. Where did they talk to you?

(Testimony of Charles E. Smith.)

A. There's a little room up there from the cell where, I don't know what they call it, something like an anteroom; everybody talks there.

Q. About what time of the day did they come to talk to you? A. About around noon.

Q. How long did that talk last?

A. About an hour.

Q. What was the nature of that talk?

A. They was asking me a bunch of questions about this M-K checks.

Q. Did you at that time make any admissions or statements that would connect you with this M-K matter? A. No, I didn't.

Q. What happened to you after that interview came to an end?

A. They took me back to the cell.

Q. How long did you remain in the cell then?

A. Until Sunday.

Q. Until Sunday, and about what time Sunday? A. I'd say around 12:30.

Q. Were you taken out at that time on that date? A. Yes, I was.

Q. Where were you taken?

A. I was taken back to that room again, the anteroom. [198]

Q. Did you see any people in that room?

A. There was Mr. Harkabus and William Traf-ton and Detective Pass.

Q. What happened in that room then?

(Testimony of Charles E. Smith.)

A. Well, Mr. Pass told me that I better make a statement.

Q. Well, is that all he said?

A. Well, he told me—he just told me.

Q. What was his attitude when he told you that you better make a statement?

Mr. Plummer: I object to what his attitude was.

The Court: Objection sustained. This is on direct examination.

Q. (By Mr. Nesbett): What was the occasion for Detective Pass telling you that you better make a statement? What were the circumstances under which he made the statement?

A. He told me that—when I first went in there, he told me I better make a statement so he'd get back up North and wouldn't be down there too long.

Q. Well, did you make a statement right then?

A. No, I didn't.

Q. Was Harkabus taking any part in this conversation? A. Yes, he was.

Q. Was Lt. Trafton taking any part?

A. Very little. [199]

Q. Now, how long were you in the room with those people? (pause) Approximately, on that date?

A. I'd say around three hours.

Q. Around how long? A. Three hours.

Q. During the course of the time you were in that room, did any attorney attempt to visit with you? A. Yes, he did.

Q. About how long after you had been in the room did this happen?

(Testimony of Charles E. Smith.)

A. I'd say around two and a half hours.

Q. And how did you learn that an attorney was attempting to see you?

A. Well, the jailer there, he came in the room there and said there was an attorney out there to see me.

Q. And did you or any one in connection with this interrogation make any remark?

A. Mr. Harkabus, he said that he could see me when he got done with me.

Q. Do you know who Mr. Harkabus was talking to when he said that? A. The jailer.

Q. Did the jailer make any remark to Mr. Harkabus? A. Not at that time, he left.

Q. Did you learn that the attorney made later attempts to see [200] you?

A. The jailer come in again, oh, I'd say around fifteen minutes.

Q. And what did the jailer say on that occasion?

A. He said that I had a right to see an attorney and an attorney was wanting to see me.

Q. Did Mr. Harkabus, Lt. Trafton or Detective Pass make any remarks at that time?

A. Mr. Harkabus he said they was about done, that he'd see me in a few minutes.

Q. Did the jailer make any statement at that time? A. He left him in.

Q. Now, did the jailer make any other remarks in connection with you in seeing your attorney?

A. He did say that I had a right to see him, or

(Testimony of Charles E. Smith.)

that he said—he was talking to Mr. Harkabus when he said this, he said “he has a right to see his attorney”; that’s all he said.

Q. Who said that? A. The jailer.

Q. Was he talking to Mr. Harkabus?

A. He said it at Mr. Harkabus.

Q. Was that before or after Mr. Harkabus said “the attorney can see him when we get thru with him”? A. That was afterwards.

Q. Now, did you in fact see your attorney there after?

A. Oh, about ten minutes later, he was standing right in the [201] doorway there.

Q. Now, during this ten-minute interval, the attorney appeared before—the attorney appeared. Did Detective Pass go out for purposes of talking to the attorney to your knowledge?

A. Not to my knowledge.

Q. Do you know who brought the attorney to the door when you saw him?

A. I know that he was with the jailer; that is the only one I know that he was with.

Q. Did he come inside the room very far?

A. No, just to the doorway.

Q. And did the attorney make any remark when he came to the door?

A. He asked me if there was anything that I wanted to see him about.

Q. Did the jailer make any remark prior to the attorney’s statement? Did the jailer announce the attorney or did he——

(Testimony of Charles E. Smith.)

A. Oh, yes, he—when he come up there, he said, “this is Mr. Harris” and my dad had sent him down for me.

Q. Did Mr. Harkabus, or Mr. Pass, or Mr. Trafton make any statement in response to the statement of the jailer? A. None then.

Q. Were you all sitting down?

A. All but Mr. Trafton; I believe he was standing. [202]

Q. Did any of those three people you were with in the room make any statement when the jailer said, “here’s the attorney that your father sent down”? A. No, they didn’t.

Q. The attorney then made the statement to you that, was there anything he could do for you, is that right? A. Yes.

Q. Did you—were you still at the table or sitting down, rather? A. Yes.

Q. Were you sitting at the table with Harkabus as he testified? A. Yes, I was.

Q. Did—what did you say, if anything, to the attorney then?

A. I said, “no, there wasn’t”.

Q. Did you want to see your attorney, or the attorney at that time?

A. Well, I didn’t want to cause no trouble so I just—they was just about overwith, so I said, “no”.

Q. How long had you been in the room at that time?

The Court: It’s already been testified to, counsel.

(Testimony of Charles E. Smith.)

Mr. Nesbett: Was it two and a half hours, your Honor?

The Court: Yes.

Q. (By Mr. Nesbett: And how long had it been since your attorney had been announced? [203]

A. I would say mighty close to a half hour.

Q. Why didn't you or, rather, I'll ask you this: did Harkabus or any of them say, "well, you can go out and talk to your attorney if you want to"?

A. No, they didn't.

Q. Did anyone tell you that you had a right to confer with that attorney in private?

A. No, they didn't.

Q. Had you signed anything up to that time?

A. No, I hadn't.

Q. Were you ready to sign anything?

A. Yes, I was.

Q. Now, Mr. Smith, did you in fact sign something that day? A. Yes, I did.

Q. Do you know what you signed? What was it?

A. I signed a statement written up by Mr. Harkabus.

Q. How was it written up, if you recall?

A. It was just written on plain paper.

Q. Was it written—typewritten or longhand?

A. It was just written in longhand.

Q. How long after your attorney, the attorney left did you sign this statement, approximately?

A. Right away.

Q. Was the statement already written up at that time then? A. Yes. [204]

(Testimony of Charles E. Smith.)

Q. Had Mr. Harkabus been writing then on the statement during this entire interview?

A. Yes, he wrote it all.

Q. Do you recall what was at the top of that statement?

A. Well, I thought it said that "this statement will not be used against you".

Q. Was that, to your recollection, was that statement written in handwriting on the top of the statement?

A. Yes, it was.

Q. Had Harkabus been questioning you in connection with some fire loss in addition to the M-K matter?

A. Yes, he was.

Q. Was any typewritten statement given to you on that day to sign?

A. There was a little later.

Q. I see. Was that the statement that has been presented to the Court here?

A. Yes.

Q. Where did you sign that statement, if you recall?

A. They brought me out of my cell and back in that room again.

Q. And about how long after the afternoon was it when your attorney called, was it, that they brought this other statement to you?

A. Oh, around an hour.

Q. Are you positive you had previously, however, signed the [205] handwritten statement of Harkabus?

A. Yes.

Q. Did you—were you told by Harkabus or any of them that you needn't make any statement if

(Testimony of Charles E. Smith.)

you didn't want to? A. No, I wasn't.

Q. Were you told by them that prior to the commencement of the Sunday meeting that you were entitled to an attorney and needn't make any statement? A. No, I wasn't.

Q. Why didn't you get up and demand to see your attorney at the time he stood in the door there and asked you if he could do anything for you?

A. Well, I already—the statement was just made out, you know, and everything was done but it was just signed and I didn't want to cause any trouble; it was just about over with.

Q. Did Detective Pass make any statement to you in connection with what might happen to you if you went ahead and signed the statement and cooperated?

A. He told me if I would cooperate that he would see that it was known up here.

The Court: Mr. Nesbett, please don't lead the witness now; even if the Government doesn't object I will have to. I want to do the best I can for this Defendant, but I don't want you to ask leading questions to determine that. Let this witness [206] testify what is determined, please.

Q. (By Mr. Nesbett): Mr. Smith, about what time of the day then was it that you signed this typewritten statement?

A. I would say around five, something like that; maybe five-thirty. It would be hard to say.

Q. That was on a Sunday, was it?

A. Yes, it was.

(Testimony of Charles E. Smith.)

Q. What was then done with you?

A. After I signed?

Q. Yes.

A. I was taken back to my cell again.

Q. How long did you remain in the cell?

A. Well, until they called me up for, some place, to see about some extradition.

Q. Do you know where you were called and on what day it was that you were called?

A. No, I don't.

Q. Well, what happened when you were called up this next time in connection with extradition?

A. Well, there was a room full of people there and Mr. Harris was there.

Q. Who is Harris? Was he the attorney?

A. My father got, yes, sir.

Q. What happened in that room full of people?

A. I guess they was talking about extradition because they never did ask me nothing. I just——

Q. Were any statements made to you in that room by anyone? A. Not to my knowledge.

Q. Was there a judge, someone sitting there, an authority? A. Yes, there was.

Q. At a desk? A. Yes, there was.

Q. Did that person make any statement to you during that hearing? A. Not to me.

Q. Did that person make any statement in connection with any charge against you?

A. No, he didn't.

Q. Well, what was the nature of the hearing?

A. I believe it was extradition.

(Testimony of Charles E. Smith.)

Q. What did Harris do there for you? Why was he there, do you know?

A. Well, he was talking about something that they arrested me wrong or something like that, and they didn't give me no counsel or nothing like that. He was going to fight extradition.

Q. How long were you in the room?

A. Oh, about half an hour.

Q. Were you, during that time you were in that room, advised that—was a Complaint read to you charging you of having to do with [208] these checks, forging them? A. No, there wasn't.

Q. Did you sign anything in your room?

A. No, I didn't.

Q. What next happened to you?

A. Well, they took me back to my cell again.

Q. And how long were you in the cell that time?

A. Oh, I believe a day or—either one day or two days.

Q. Then what happened to you?

A. We got on a plane and came to Anchorage.

Q. Where did you go in Anchorage?

A. They took me down to Federal Jail.

Q. When did you see anyone or have occasion to leave the Federal Jail after you had arrived?

A. Mr. Pass come and got me.

A. And when, with respect to the time of your arrival?

A. Oh, about two days, I believe, something like that.

Q. Were you ever taken before a U. S. Commis-

(Testimony of Charles E. Smith.)

sioner here? A. Yes, I was.

Q. Were you informed of the charge or complaint read to you? A. Yes, I was.

Q. And where you advised of your rights on that occasion? A. Yes, I was.

Q. Were you asked about preliminary hearing?

A. He just asked me if I wanted to waive it.

Q. What did you say?

A. I signed the slip and signed "yes".

Q. How long were you in the Federal Jail here before you were released on bail?

A. I'd say around ten days; I don't really know.

Q. Were you in jail during the time that these witnesses have testified that you rode around town with them, identifying the places that you——

A. Yes, I was.

Q. Have you read this typewritten statement that has been offered in evidence? A. Yes.

Q. You did read it, didn't you? A. Yes.

Q. Do you recall ever having read that full statement ever before?

A. The front first paragraph there is a little mixed up to my notion.

Q. Is that your signature on the pages?

A. Yes, sir.

Q. When they took you out of your cell the second time on Sunday to look at that statement, I will ask you did you read that statement over in full before you signed it?

A. I probably just glanced thru it and just signed it to be done with it; that's all. [210]

(Testimony of Charles E. Smith.)

Mr. Nesbett: I believe that is all, your Honor.

The Court: Very well. You may cross examine, Mr. Plummer.

Cross Examination

Q. (By Mr. Plummer): Mr. Smith, was—did you testify in response to a question of Mr. Nesbett's, that the only way you would ever get any sleep was to sign a waiver of extradition?

A. Yes, I did.

Q. And what time was it of the day that you signed it? A. I'd say around six.

Q. Six in the afternoon?

A. Six in the evening, yes.

Q. Do you usually go to bed before that time, do you? A. No.

Q. Now, did your attorney, that is, Mr. Harris, when he came to your cell there, did he—did you make any request to talk to him alone?

A. No, I didn't.

Q. Did he advise you that you could talk to him alone? A. No, he didn't.

Q. Did anybody prevent you from making such a request? [211] A. No, they didn't.

Q. Were you frightened in front of detective Pass and these people to request that?

A. Well, it was all done; there was so much argument before that I thought, well, I better just do it and be done with it.

Q. Had they made any threats to you of any kind? A. No.

Q. May I have Plaintiff's Exhibit No. 20? May

(Testimony of Charles E. Smith.)

I approach the witness, your Honor?

The Court: You may.

(Thereupon, the exhibit was handed to Mr.

Plummer and he then approached the witness.)

Q. (By Mr. Plummer): I wonder, Mr. Smith, is that your signature there? A. Yes, it is.

The Court: He so admitted that, counsel, if you so recall.

Q. (By Mr. Plummer): I wonder if you'd just read that first paragraph.

A. (Reading): "I, Charles Edward Smith, residing at 11815 - 78th Avenue, South, Seattle, Washington, hereby make the voluntary signed statement to Special Deputy, United States Marshal Ted Pass, and Lt. William W. Trafton, Dept. of Territorial Police. I have been advised of my right to counsel, that I need not make a statement and any statement that I do make may be [212] used against me in a court of law. No threats or promises, or any form of duress have been used to induce me to make this statement."

Q. Fine. Now, that as a matter of fact, you just said were your rights explained to you?

A. They never explained nothing to me. The first ones I signed there was four papers written up in his own handwriting.

Q. Well, you signed this, though, didn't you?

A. Yes, he brought this later.

Q. Well, did you—had anybody explained your rights to you?

A. No, they didn't, not at that time.

(Testimony of Charles E. Smith.)

Q. Well, had they ever? You said in your statement that they did. Had they?

A. It says in this statement at the top of it, yes.

Q. Well, had they?

A. No, they hadn't.

Q. Well, now, your attorney had been there. Did you tell him that nobody had explained your rights to you?

A. He never said too much to me because he was arguing with Mr. Harkabus and Ted Pass for keeping him out.

Q. Well, you testified that he was in there, didn't you?

A. Yes, I did. He came in on his own.

Q. Did you ask him what your rights were, or tell him that your rights had not been explained to you? A. No, I didn't. [213]

Q. And you didn't ask for a private appointment with him or anything like that?

A. No, I didn't.

Q. Well, if you were concerned about your rights that these people had been threatening you, would it be natural, sir, to assume that you would have mentioned it to him?

A. I just didn't know that.

Q. This statement was typed and signed—typed and at least presented to you for signature after seeing your attorney? A. Yes, it was.

Q. Now, when did you first become acquainted with the nature of the charges against you, sir?

A. Well, he mentioned them Saturday.

(Testimony of Charles E. Smith.)

Q. Now, on Saturday, didn't they mention them to you at the time that they arrested you?

A. No, they didn't.

Q. What you think they was arresting you for?

A. I had no idea.

Q. Did you inquire?

A. I asked them and they just smiled at me; they just went to their cars and that's it.

Q. They just smiled at you? A. Yes.

Q. I wonder if I could inspect the Court's file for just a minute? [214]

The Court: You may.

(Thereupon, Mr. Plummer began to inspect the Court's file.)

Mr. Plummer: What I'm trying to find in here, your Honor, is the original return and—of the warrant.

The Court: I'm sorry; I can't help you, counsel.

Mr. Plummer: I don't even know whether they're kept in the file. I think it would be. (Pause.) I don't want to waste the time of the Court, but I am——

The Court: Well, you may be able to give it to the In-Court Deputy, maybe she could help you while you are examining on something else.

Q. (By Mr. Plummer): Now, was it your testimony, Mr. Smith, that at the time that the officers came to the house you were as a matter of fact in the house; that is, at your parents' home in Renton, Washington?

A. That they come in the house?

(Testimony of Charles E. Smith.)

Q. That at the time that they arrived there, that you were at home inside the house?

A. Yes, I was home.

Q. And where were you inside the house?

A. I was talking to him on the phone.

Q. They were outside at the door, though.

A. They was talking to me—see, they talked to me all the way up there. This fellow explained to me up there that [215] they can talk to you right from the patrol car, so, they talked to me right at the last second.

Q. You are positive at the time that they knocked on the door that you weren't in the closet?

A. No.

Q. Had you just been in the closet?

A. No.

Q. Did you just go into the closet?

A. No.

Q. And is it your testimony, sir, that you were never arraigned while in Washington?

A. Not to my knowledge.

Q. Is your testimony that you have not—were not arraigned while in Washington, sir?

A. (Pause.)

Q. Let me ask you, sir, if you ever appeared on February 21st, before a Mr.—

The Court: You mean "March", don't you, counsel? It apparently is an undisputed fact that he was not arrested until March 15th; therefore, he could not have been arraigned in February.

Mr. Plummer: I am trying to—I'm sorry, your

(Testimony of Charles E. Smith.)

Honor, I have the wrong document here. I am——

Mr. Nesbett: I think Mr. Plummer is looking at Walker's papers. [216]

Mr. Plummer: I am—I was trying to make heads and tails out of it and I couldn't—that was probably the reason. May I have just one more minute, your Honor?

The Court: You may. Let's get the jury back down and excuse them. There is no use keeping them any longer, Mr. Johnson (Court Bailiff), please. It's now 4:30 and it's obvious that the balance of the day will be consumed in this problem. Could we start at 9:00 o'clock tomorrow morning? Tomorrow is naturalization ceremonies and we will not be able to start this trial until 10:30. The next morning the Court is committed at 8:00 o'clock for two hours on another problem. It looks like we will have to plan a night session as much as I dislike it.

(At this time, the jurors were brought back into the courtroom by the Court Bailiff.)

The Court: Let the record show all the jurors are back and present in the court. Ladies and gentlemen of the jury, this proceeding has taken considerably longer than anticipated by counsel and the Court. It is obvious that we cannot conclude today and therefore, I do not want to keep you any longer. Without objection, then, you are now excused to report tomorrow morning at the hour of 10:30. Bear in mind, tomorrow morning we have naturalization ceremonies which this Court must conduct and we will not be able to resume the trial

(Testimony of Charles E. Smith.)

before 10:30, at the earliest. As you know, I must instruct you not to discuss this case among yourselves nor are you permitted to let others discuss [217] it with you. You may now be excused. The Court will remain in session.

(At this point, the jurors left the courtroom.)

The Court: Let the record show all the jurors are absent from the courtroom. You may now proceed, Mr. Plummer.

Q. (By Mr. Plummer): Now, Mr. Smith, do you deny that on the 19th day of March, you appeared before the Commissioner, a Mr. John A. Burns down in Seattle and at that time you were accompanied by your attorney, Richard D. Harris, and that the Commissioner read the charge in the Complaint and explained it to you? Do you deny that at this time?

A. If he did, I don't remember.

Q. Do you deny that he did it?

A. There was so much junk going on there, I don't remember what the heck happened.

Q. Well, you remember apparently the last part of the proceeding, I guess, from your testimony; was that right what happened after they finished reading the Complaint to you and advising you of your rights? Wasn't Mr. Harris along with you at that time?

A. Up in——

Q. In front of the Commissioner.

A. Yes, he was there. He did all the talking; in fact he did everything. I just sat at the desk. [218]

(Testimony of Charles E. Smith.)

Q. Did the Commissioner do any of the talking?

A. He was talking to Mr. Harris. I was sitting back with my dad and mother.

Q. Do you deny that the Commissioner read the Complaint to you and advised you of your rights on the 19th day of March, in the Commissioner's Court in Seattle, Washington?

A. The only thing they was arguing up there that I know was about that extradition.

Q. I ask the Court to take judicial notice of its own files and especially that item in the file marked "Record of Proceeding of Criminal Cases", the report of the proceedings in front of the United States Commissioner, John Burns, which is opened in the file. I have no further questions.

The Court: Motion is granted. You may proceed, Mr. Smith—or, Mr. Nesbett, on recross—or, redirect.

Mr. Nesbett: Could I see that file, your Honor?

The Court: Yes, I have marked it for your convenience. Let's take a little recess.

Mr. Nesbett: I have no other questions, your Honor.

The Court: Very well, then.

Mr. Kay: I would like to ask a question. I am not sure what my status is in asking.

The Court: That is the point. I was going to call your attention to it. I doubt if you would have the right, counsel. [219]

Mr. Kay: Well, I certainly represent a separate defendant here who has an interest in this state-

(Testimony of Charles E. Smith.)

ment because there are some hearsay statements contained in the statement and I think I have a perfect right to inquire as to whether or not—the circumstances. I only want to ask a couple of questions which may or may not be objected to; I don't know.

The Court: What is your position, Mr. Plummer?

Mr. Plummer: I have no objection.

The Court: Very well, you may proceed.

Q. (By Mr. Kay): Mr. Smith, you were sitting here in court this morning when Mr. Harkabus testified, were you not? A. Yes, I was.

Q. Did you hear Mr. Harkabus state that at the jail on, I believe, Sunday, that Pass, Officer Pass made the statement to you something like this: "based on past experience, if you make a full confession it will go a lot easier with you". Did you hear Mr. Harkabus so testify?

A. Yes, I did.

Q. Did Pass make such a statement to you, either that, or similar to it?

A. Well, made one similar to it.

Q. Can you recall what the gist of the statement or the exact words or close to the words that Pass used?

A. Well, he told me, I believe, that if I would cooperate, that [220] it would go easier on me.

Q. Did Officer Pass' statement so made to you at that time influence you in any way in making your statement?

A. Well, I made it right after that.

(Testimony of Charles E. Smith.)

The Court: Any redirect?

Recross Examination

Q. (By Mr. Plummer): You had had a chance to see your attorney, Mr. Harris, of course, before making the statement and before signing the statement, hadn't you?

A. The statement was already made before I seen Mr. Harris.

Q. Typed and presented to you?

A. Pardon?

Q. Was it typed and presented to you?

A. No, it wasn't.

Q. By the time it was typed up and presented to you and you finally got around to signing it, you had had an opportunity to see Mr. Harris?

A. Yes, I did.

Q. Fine.

The Court: Very well. You may step down. You may [221] call your next witness, Mr. Nesbett. Did you have another question?

Mr. Nesbett: No, I have no other witnesses, your Honor.

The Court: Very well. Then, I will hear argument of counsel.

Mr. Kay: We were about to take a recess. Let's take a short one before we argue.

The Court: I want to finish this up today, counsel, as you can see the need for it. How much time—five minutes? Will that be sufficient for you? The

Court will go into recess for a period of five minutes.

(Thereupon, following a short recess the following proceedings were had:)

The Court: You make an objection; then, I suppose you should move first.

Mr. Plummer: For the sake of the record, I don't know whether it's necessary or not, but I at this time renew my offer into evidence, Plaintiff's Exhibit No. 20.

The Court: Very well.

Mr. Nesbett: And I object to the admission in evidence, your Honor, upon several grounds, the first ground being that there has not been sufficient proof of the corpus delicti yet. There is no proof yet that a crime is committed. It's not the proper time to attempt to introduce a statement. Secondly, on the ground the statement—— [222]

The Court: Pardon me. In that respect, is there any evidence before the Court that this Defendant did negotiate any of these checks?

Mr. Plummer: Yes, by a lady Shields on Count One and Helen Burnett on Count Five of the indictment. They both testified from the stand and both testified that the checks, as I recall were no good and that they never received any payment for them.

The Court: Yes. Very well.

Mr. Nesbett: Upon the second ground, your Honor, that the statement was taken in violation of Rule 5, Federal Rules of Criminal Procedure. That statement was taken without advising the Defend-

ant of his right to counsel; that the statement was obtained upon a promise of leniency made to the Defendant.

Your Honor, the main defect of this statement and the reason that I am certain that it is inadmissible in evidence is that the very thing happened that the law attempts to guard against and that is holding a Defendant in jail without arraigning him for the purpose of obtaining a statement and that is exactly apparently what was done here — exactly what was done. There is absolutely no reason for not having arraigned this man on Friday when he was picked up at about maybe 3:00 or 3:30. There was no reason for not arraigning him on Saturday. There was no reason for not having arraigned him on Sunday, even; and it's certainly absolutely inexcusable that he wasn't arraigned [223] on Monday, but even if you accept the statement of Burns, there, the Commissioner, that he was arraigned in Seattle, which there seems to be some confusion on, he wasn't arraigned until Tuesday, following a pick-up on Friday. During all of that time he was held in jail, during a good portion of the time, and up until the time he made the statement he was under examination by officers, anywhere from two to three, and I believe on one occasion a total of four. Your Honor, that applies right in the face of the rule, Rule 5, and in the face of the Supreme Court decisions. There is no question in my mind but what Officer Pass promised this man leniency when he told him that if he would make the statement things would go a lot easier for him. Now, I

believe the Defendant's testimony when he says that. Harkabus even substantiated it. As much as he hated to, he finally had to admit that a statement in gist as follows, which is one way Mr. Harkabus likes to state the substance of testimony. He likes to phrase it in his own words and he says the substance of the Defendant, or, rather the statement made by Pass was that "things would be easier if cooperation was given", or words to that effect. The words the Defendant remembers are that "if you give the statement things will be a lot easier for you", and that he gave the statement shortly thereafter.

Your Honor, I think the Defendant has plainly outlined the situation. I think the officers did brush his mother aside and walked right in because they had made the telephone call and [224] had determined that Mr. Smith was in the house. They made an illegal entry right then and there and as near as I can determine the facts as we have them now. The Defendant does not—did not receive any warrant, was not told why he was arrested. There was no search warrant, under any testimony, in order to enter his house. If they had a warrant, it was certainly never produced. Harkabus didn't see it. No one else is here to testify that there was a warrant used.

The Court: Is there one in the files, counsel for the Government?

Mr. Plummer: There is one in your own file, your Honor. There is a warrant showing there was one issued on the 14th, yes.

Mr. Nesbett: Now, the examination that the Defendant was put through on Friday afternoon resulted in the signing of a waiver for extradition purposes. That was a somewhat lengthy interrogation. Nothing was admitted. He was interrogated again on Saturday. Completely disregarding any duties that the officers might have had with respect to arraignment, they continued to interrogate him and continued the interrogation for a period of three hours on Sunday. Now, your Honor, it's absolutely inexcusable and certainly, you can't reconcile it and reason with the statement of Harkabus that the Defendant was advised of his right to counsel and of the fact that any statement he might make would be used against him when you think of that testimony in [225] connection with what admittedly happened regarding the call of attorney Harris. Now, Harkabus strained the point at the proper time to try and help the Government's case, in my opinion. He is an old-timer at it, and I think that he first did it, your Honor, when he admitted—when he stated that he had heard the officer announce his identity before going into Smith's home, when he was some fifty feet away, and after he said he heard the officer announce his identity, he decided he better back up and not say any more about it and not be acquainted with any more of the conversation, so I couldn't get any more out of him, out of what he heard there. He didn't hear anything, so he just backed right off from that session. I think he strained his testimony there and backed right off like an experienced man would. I think he

strained his testimony again when he testified concerning Harris' attempt to get in and see Smith, at the time they were questioning him because there is no way to reconcile a clear thinking law enforcement officer like Harkabus, and the testimony that he could and should give, with the mess he made of it up there for a few moments when he had Pass going out to talk with the attorney and saying in one breath that Pass came back with the attorney, but saying also when Pass came back that he said to Pass, "maybe we better let the attorney see him". He never straightened that out in my mind.

Now, there you have a man at the end of, practically at the end of the third grueling period of examination by these officers; [226] his attorney finally gets near him, attempts to see him and the jailer announced that he is there; Harkabus admits that. Nothing was done, Harkabus says, and here is when he strained his testimony again, in my opinion, and the jailer said, "in Federal cases—", mind you, your Honor, "in Federal cases I—" I, the jailer, "don't have to let them in unless I want to". That doesn't add up at all. It doesn't add up, but Harkabus says that is what he understood happened. Of course, he was quoting, in gist, again, as he loves to do, but the Defendant's testimony certainly is reliable enough there. The jailer came in and says, "there is an attorney here from the Defendant's father and he wants to see him". Harkabus says, "he can see him when we get through". Fifteen or twenty minutes later, Harkabus admitted it was at least twenty-two—twenty-five minutes

later, still being examined here by Harkabus and the other two officers. The jailer comes back again and says, "the attorney wants to see him and I think the attorney has a right to see him", and the Defendant says that Harkabus then said, "We will be through with him shortly. He can see him when we are through". The next thing that occurred is, somehow, or other, I think the jailer probably is the one that is responsible for it, he opens the door and lets the attorney walk in a step or two. Still no one of these officers, that is supposed to have taken so much pains to notify him of his right to counsel, say, "Now, you can see this attorney, Smith, if you want to". They all sat there quietly while the attorney is doing [227] his best to see the man. Now, here is the man at the end of the third day and three hours of grueling questioning. He's admitted some statements. He's in the mood to sign. Pass has said, "If you will sign, it will go a lot easier". He doesn't want to make these officers mad at him; he's tired of the whole thing, sick and tired of it and so what does he do? The officer—the attorney says, "Is there anything I can do for you", and he says, "no". Well, he thought there wasn't. He didn't know that he had a right to get up and walk out with the jailer, at least into private quarters in that jail and talk with his attorney. He had that right. No one of these law enforcement officers told him.

Your Honor, that is inexcusable—all before arraignment, which should have occurred sooner.

Now, there, your Honor, is the gist of my objection, and I invite your Honor's attention to the

Mallory case. I assume——

The Court: I am familiar with that case.

Mr. Nesbett: Are you very familiar with it, your Honor?

The Court: Yes.

Mr. Nesbett: Do you have the citation, I suppose?

The Court: Yes, not in this case, but I have had it in many other cases.

Mr. Nesbett: And, your Honor, the Carignan case, I suppose your Honor is very familiar with that case, where the same rule is touched upon and as the ruling in the McNabb case [228] reiterated in the Carignan case and certainly as late as 1957 in the Mallory case expounded in no uncertain terms and there in that case, the Defendant was arrested at 2:30 in the afternoon. The statement or confession was obtained at 10:30 that night and he was not arraigned until the following day and the statement was not admitted in evidence. The Courts say and without any hesitation, with no equivocation now, "you must follow Rule 5". They didn't do it here. They ignored it. Now, whether they ever went through a form of arraignment on the 19th, I don't know. I don't know.

The Court: Well, without better evidence, the Court will have to presume that they did.

Mr. Nesbett: But, if they did, that was on the 19th and that was on a Tuesday, your Honor, and so it cannot save the situation here as far as the Government is concerned.

If your Honor is familiar with those cases, I have

nothing more to say. I was going to read something in connection with the Rule in part, of the opinion, but if your Honor is familiar with it——

The Court: No, I have considered that in—on recent occasions. The Court is of the opinion and hereby rules the objection will be sustained. I feel that this is a case where they have not complied with the Rule set forth, No. 5—without argument of counsel, for the reason that there is four days that elapsed between the date of arrest and the date of the first [229] arraignment, and I feel that based upon those facts, plus the others, there is sufficient grounds to justify the Court's position.

Mr. Plummer: May counsel be heard just briefly, your Honor?

The Court: I think not, counsel. The Court's made up its mind based upon the evidence. I wouldn't want to waste your time or counsel's, but for the record, I have no objection to you stating something for the record.

Mr. Plummer: Let me just say, briefly, your Honor, the McNabb case which counsel mentioned is a landmark case. Of course, it doesn't say as long as a statement is made while the man is in confinement it's not admissible. There has to be that, plus the duress and pressure brought on him. There was no indication that there was pressure being brought here. Counsel also made a statement about the Mallory case. It doesn't even touch on our case here. The Mallory case, if your Honor is familiar with it is because there was not reasonable cause to make the original arrest. The original arrest was faulty.

Now, in this case, the arrest was perfectly legally valid and unless something happened after that arrest, some pressure was brought against this man, there was no reason in the world why he couldn't give a statement. Now, let me throw this out to your Honor, too, while I am here. Now, and I think it's very important that your Honor consider this before ruling——

The Court: The Court's ruled. [230]

Mr. Plummer: Well, let me say this, then: that not one word, not one word, has been said in this court to your Honor, showing any requirement of any kind that the law was not complied with at the place of the arrest, which is the law of Seattle, the law of Washington. The Federal Rules of Criminal Procedure has nothing to do with an arrest made down in Seattle, Washington.

The Court: No, but this Court is bound by the Rules of Federal Procedure.

Mr. Plummer: But, the arrest wasn't made in this court, your Honor, or in this jurisdiction. It was made down there.

The Court: I appreciate that, but I wouldn't want to consider that meritorious argument.

Mr. Plummer: And the statement was not taken by any Federal law officer. It was not taken by any Federal officer at all. It was taken by Mr. Harkabus, who is not a Federal officer and certainly, he should not be bound by Rule 5.

The Court: Oh, counsel, this Court is bound by the Rules, regardless of who may come before it.

Mr. Plummer: But, your Honor, Mr. Harkabus

—I mean, this Rule 5 is telling about Federal officers. Mr. Harkabus isn't. This fellow could have told his mother or me or anybody.

The Court: I don't find anything here about a Federal officer. It says, "An officer making an arrest shall take the arrested person——"

Mr. Plummer: And last, but not least, I want to point [231] out to the Court the case of *Symons vs. United States*, found in 178 Fed. 2nd, at Page 615, which is, of course, the 9th Circuit case and pointing out that at least in this Circuit and Seattle is certainly in this Circuit, that the statement, that he should be taken to the nearest available Commissioner. It doesn't mean that he has to be taken there right away—has to be taken only during regular office hours.

The Court: Of course, in this case we have four days among which we have had two regular office hours; that would be Friday from 3:30 until 5:00 o'clock, and all of Monday. That is the thing, counsel.

Mr. Plummer: If the date is right on there, it probably would be. I didn't check to make sure.

The Court: I am relying upon your statement, counsel. No one has disputed you, so I assume it to be correct.

Mr. Plummer: No, it's not correct. Would you please read this? Would you please read the first paragraph and then the second paragraph, "on the 19th," it says, "he again appeared before me." The first paragraph is dated on Monday, on Monday, the 18th.

The Court: Naturally, I had to rely upon you, counsel.

Mr. Plummer: I'm sorry I misled the Court. I'm sorry I misled the Court. I was in a hurry trying to not take up the time, any more time than necessary, so, the rule of the Symons case clearly applies. I would request that the Court not render [232] decision on it until tomorrow morning, for—because by the testimony of the witnesses, the Defendant himself, it was late in the afternoon on Friday and he was taken there on Monday morning—Saturday and Sunday not being business days for Commissioners in Washington.

Mr. Kay: Is that—are you testifying to that? It's business hours here and they hold the arraignments on Sunday in the Territory of Alaska.

Mr. Plummer: He was not arraigned here.

Mr. Kay: I don't know whether the Commissioner holds office hours on Saturday or not, but if you are going to testify I will testify that they do in Portland.

The Court: Well, that is—let's not go beyond the record, counsel. That won't help the Court one iota.

Mr. Kay: What was the hour on Monday?

The Court: It doesn't state.

Mr. Plummer: Possibly the Defendant would have some idea. It just says the date, no hours are given.

The Court: Are you through, counsel?

Mr. Plummer: Yes, sir.

The Court: Very well, the ruling of the Court will stand. The trial of this case will be continued

until tomorrow morning at the hour of 10:00 o'clock a.m. and this Court will stand adjourned until tomorrow morning at the hour of 9:00 a.m. when this Court will conduct naturalization proceedings.

(Thereupon, at 5:10 o'clock p.m., February 24, 1958, court was adjourned to the next morning, this case to be resumed at 10:30 o'clock a.m., February 25, 1958.) [234]

February 25, 1958

Proceedings

The Court: Mrs. Bradley, will you please come forward and take the oath.

LOIS BRADLEY

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

Q. (By Mr. Plummer): Will you please state your name? A. Lois Bradley.

Q. And what is your present occupation?

A. I am Clerk of the Criminal Court in the United States Commissioner's office.

Q. Did you at my request bring a certain file from your office down to the courtroom?

A. I did.

Q. And would you tell me what it is, sir — or, ma'am.

A. Well, it's a copy of the transcript that was sent to the District Court of the case against— United States vs. Charles Edward Smith.

(Testimony of Lois Bradley.)

Q. And is that your official record?

A. It is.

Q. Down in your court? [237] A. It is.

Q. Would you look the transcript over and tell me what, if anything, appears there on March 21st, under the date of March 21, 1957?

Mr. Nesbett: Your Honor, Mr. Plummer hasn't observed the usual rule of showing us the document that he intends to question the witness on, and I object to the question that's now, as yet, unanswered, on the ground that it has not been shown that she is looking at an official record.

The Court: Counsel, could you present the record to——

Mr. Plummer: Yes, I didn't want to keep anybody here over the noon hour and as a matter of fact, I didn't, your Honor, intend to offer this, if I could get away from it because it is their official record down there. I was merely going to have her tell what it says. I, through the Court, will apologize to counsel for not observing the proprieties.

The Court: The Court accepts your apology. Thank you. You may proceed.

Q. (By Mr. Plummer): I ask you if you will, Mrs. Bradley, look at your transcript and advise the Court and the Jury what appears under date of March 21, 1957?

Mr. Nesbett: I will object, your Honor, first, on the ground that as I said before, the document has not been identified as an official record, firstly. Secondly, on the ground that [238] the document is

(Testimony of Lois Bradley.)

complete—has no relevancy whatsoever to the proceedings here and I ask if your Honor would take a look at it yourself. It's simply a self-serving attempt to cast innuendo and nothing else; has no relevancy whatsoever. There's been—the indictment is before the jury.

The Court: The objection is overruled on the first ground because the evidence as I recall is this witness testified that it was. As to the second ground—just a moment, please. Would counsel approach the bench, please.

(Thereupon, the United States Attorney, together with defense counsel and the Court Reporter approached the bench and the following proceedings were had out of the hearing of the Jury:)

The Court: Mr. Plummer, what is your purpose of——

Mr. Plummer: To show, your Honor, that he was arraigned—let the jury know what you, of course, heard in yesterday afternoon's discussion, having been arraigned here on March 21. Subsequent to that he made oral admissions to various people around town and it is my intention to call them and have them testify as to the oral admissions he made, which is perfectly proper. I want to first, of course, want to bring out that he was arraigned and his rights were advised by a Commissioner here and then, of course, any oral statement he might have made to anybody subsequent to that time is properly admissible.

(Testimony of Lois Bradley.)

The Court: What is your position, Mr. Nesbett?

Mr. Nesbett: Well, the witnesses are before us and he's not offered that testimony. I say as to this right now, it's absolutely irrelevant and has no connection whatsoever with this case, your Honor. It's designed only to cast innuendo because he has been indicted. They're trying him on the indictment. This has no relevancy.

The Court: It's your position then, that he can call these witnesses without proving this——

Mr. Nesbett: It's my position he can't call a witness at all for that purpose.

Mr. Plummer: What basis, Mr. Nesbett, through the Court, I will ask, on what basis?

Mr. Nesbett: I am not arguing that right now, Mr. Plummer, but that is going to be my stand, of course, and this has nothing whatsoever to do with the issues here that he has been indicted. It would be just like you could multiply that, your Honor, and show that he had been charged two or three or four times and it might accumulate effect as far as the jury is concerned and have a weight far beyond its real significance.

The Court: I would suggest to counsel for the Government that you offer it for identification as No. 23. The Court at this time will have to sustain the objection, and then it will be available in the event it becomes necessary at a later time.

Mr. Plummer: I think, before we conclude our hearing, [240] that this jury certainly has a right, when they're going to be asked to evaluate the

(Testimony of Lois Bradley.)

weight and credibility, especially in view of the standard instruction that your Honor gives as to oral admissions, to know that at the time the witness testifies, that the Defendant Smith had previously been arraigned before the United States Commissioner and advised of his rights. I think they cannot properly evaluate the weight and credibility of the testimony without it.

The Court: Well, the objection is sustained for the time being and it may be admitted unless you have objection to it—for identification purposes, only, as Government's Exhibit No. 23.

Mr. Plummer: Can this witness testify from it?

The Court: Well, at this time, Mr. Plummer, I do not believe that it's admissible. Now, I point out to Mr. Nesbett that if by chance you do object to the witnesses that Mr. Plummer intends to call, and this being a basis therefor, then, of course, at that time, the Court can reconsider the offer.

Mr. Nesbett: Your Honor, could we do this: could we convene court without the Jury at 2:00 o'clock and argue Mr. Plummer's point. If he is right, then, of course, let the tail go with the hide, but if he is not right, settle the thing once and for all.

The Court: Well, I am not going to exclude spectators from the courtroom any more during this trial unless there is [241] something that I can't anticipate and furthermore, I am not going to exclude the jurors unless argument be had, now, concerning argument at the bench on that basis.

(Testimony of Lois Bradley.)

Mr. Plummer: Now, this will be 23 for Identification?

The Court: Yes, only.

(Thereupon, counsel for the Plaintiff and the Defendants resumed their seats and the following proceedings were had in the presence of the Jury:)

Mr. Plummer: Your Honor, may Miss Bradley make a copy and substitute it for this one?

The Court: Any objection?

Mr. Nesbett: No objection.

The Court: Very well. Mrs. Bradley, will you do that during your lunch hour, then? Thank you. Unless—you may be excused then unless counsel had cross, which I doubt, at this time.

Ladies and gentlemen of the jury, it's now after twelve; therefore, the trial of this case will be continued until 2:00 p.m. As you know, I must instruct you not to discuss this case among yourselves, nor are you permitted to let others discuss it with you, and this court will stand in recess until 1:30.

(Thereupon, at 2:00 o'clock p.m., the following proceedings were had in the presence of the jury:)

The Court: Will counsel stipulate that all the jurors [242] are back and present in the courtroom?

Mr. Plummer: Yes, your Honor.

Mr. Kay: Yes, your Honor.

The Court: Very well, thank you. You may call your next witness, Mr. Plummer.

Mr. Plummer: I'd like to call Mr. Edward Dankworth.

Mr. Nesbett: Your Honor, before this witness testifies, may I approach the bench with Mr. Plummer?

The Court: You may.

(Thereupon, counsel for the Plaintiff and the Defendant, together with the Court Reporter, approached the bench and the following proceedings were had out of the hearing of the jury:)

The Court: Mr. Nesbett.

Mr. Nesbett: Your Honor, I only know this witness by reason of the fact that he introduced himself to me in the hall just a moment ago, but apparently, he runs a lie detector for the Territory of Alaska. Now, I don't know whether he is one of the witnesses Mr. Plummer said he'd call in connection with admissions made by the Defendant after his arraignment here on the 21st or not, but the mere fact that if he does identify himself as an operator of that, that piece of equipment, and his later testimony should be included by reason of the arguments Mr. Plummer and I will have here at the bench on the admissibility of admissions. I think it would be damaging and therefore, I want [243] to settle this matter once and for all, right now, before your Honor, as to whether or not he can call this witness to testify as to admissions made after this arraignment here.

The Court: Well, of course, I am perfectly willing to go ahead at this time and listen to your argu-

ment, if there is any more objection on the part of the Government.

Mr. Plummer: I will first advise the Court that because of Mr. Nesbett's apprehension about the mention of the word "lie detector", it was not contemplated that that would be brought out, but it could very well come out through inadvertence, you know. On the other, I'd be glad to argue it now, or when the time is appropriate.

The Court: Well, let's proceed right now.

Mr. Nesbett: Thank you, your Honor.

The Court: Very well, you may proceed, Mr. Nesbett.

Mr. Kay: Would you want to argue here at the bench?

The Court: Yes, I do, so as not to inconvenience the jurors, unless there is some reason to the contrary.

Mr. Kay: No, except it's more convenient to be back at your desk; since I am not arguing it, though——

The Court: You may proceed, Mr. Nesbett.

Mr. Nesbett: Your Honor, it's my contention that the illegal detention which occurred in this case, the prevention of the defendant from seeing his counsel, which was brought out in the testimony yesterday afternoon, carries over and prohibits [244] the introduction of any admission made by the Defendant to any officer even though it might have been after what was apparently his second arraignment here in Anchorage upon—about March 21st. Now, the reason for the rule is plain enough.

The Defendant was not—the Defendant was not, apparently, advised of his right to counsel. He did not get to see his counsel at the time he was entitled to. He was not speedily arraigned in accordance with Rule 5, but was detained. A confession was obtained from him under those circumstances which is not admissible as your Honor properly ruled. Now, he is still in custody, still has not seen his attorney nor any other attorney and is brought before the Commissioner here and presumably advised of his rights. He still is in custody on \$10,000.00 bail when he is taken around by officers who ostensibly, for the purpose of identifying places he's mentioned in his statement, or, escorting him around. Now, it is possible, during the course of that investigation, you might say by the officers, statements were made. Now, those statements were made, your Honor, because the bars had already been let down; as far as the officers of the law were concerned, a violation had been committed. The violation of Rule 5 carries over the Defendant is under the same coercion. The Defendant is still without counsel; his bail is \$10,000.00 and it remained that way until those officers got through with him when it was reduced to \$2500.00 and he finally got out.

I say, it carries over and they absolutely are not admissible [245] because they are a part of the original violation of Rule 5, and the Defendant's rights, constitutional rights, as well.

Now, your Honor, the case of Carignan is very familiar to your Honor. There, in that case, the Defendant was being detained. He had been detained

for six weeks on one charge. During the course of that detention on that one charge, he admitted another entirely different crime and the courts split six to three and they said that, finally, that they would allow the admissions of the Defendant made while being detained because he was being legally detained; the confession obtained was not coerced and it was of another crime, another crime, but three of the justices even dissented on that basis. They said, "even though there was no coercion to get, used to get the confession, that is a method implied by the officers to keep the man in custody and stay around and get confessions, and we are not going to go for that sort of thing". Now, that is in Carignan, although the facts of the case apply to this one in any event because it was confession of another crime.

Now, your Honor, in the case here, the Mallory case, applies the wording of the Mallory case. Now, that is a 1957 decision and at the bottom of the page——

The Court: Pardon me, in that case, there was not—even a legal arrest.

Mr. Plummer: That was the precise case that turned upon the point that there was not probable cause, so the original [246] arrest of the fellow was illegal. That is the point of the Mallory case.

The Court: So, you see, that could not apply in this case here because you won't argue to the Court that this Defendant was not in proper custody at that time. He was arraigned twice; once in Seattle and once here.

Mr. Nesbett: Yes, but I am arguing that it all grows out of the same contention that it can't—and under the wording of the Mallory case, it said, "Not until he had confessed, when any judicial caution had lost its purpose, did the police arraign him". (Page 455.)

Now, your Honor, all judicial caution, all protection set up for the protection of this man had been lost to him already when these officers took him around in their car, while he was still in custody and still without counsel.

The Court: Very well. Is that all you had?

Mr. Plummer: Your Honor, to set the record straight, I think, your Honor, the court file will reveal that Mr. Nesbett's facts are somewhat—are not in accord with the true facts of the case. They will show that he was arraigned on the 18th day of March, down in Seattle. I think he had an attorney present at that time. The file will also show that Mr. Harris represented him at a subsequent proceeding, on the 19th day of March. The testimony to the Court yesterday by the Defendant himself was that he saw his attorney on the preceding Sunday, which [247] was the 17th, your Honor. Now, I have, and I think the Mallory case is not in point, for the reasons which I have heretofore given the Court and certainly, the Court should not be bound by any dissent in the Carignan case.

Now, I think the proper rule is given in the case of *Nordone vs. United States*, which is found in 308 U.S. at Page 338. Now, this was not—this case was not a case of illegal detention, but it was a wire

tapping case and Justice Frankfurter wrote the opinion and I think the part that we are particularly concerned about is found on page 341 of the opinion and he sets out the rule there that the proper rule is that if the subsequent admissions, and so on like that, are fruits of the illegal venture in the first place, that then they should be excluded, but if they are not, if the Government had independent evidence and things of that nature, that the Government should be able to go ahead and elicit the testimony.

Now, on this case, I want to call the Court's attention to the fact that there was certainly probable cause to have this Defendant arrested because the Complaint was issued and a warrant issued on this—on March 14, 1957. That was long before he ever made the Exhibit 20 for identification, only, and in addition to that this witness who is now on the stand will testify under oath that he has never read Exhibit 20, nor was Exhibit 20 ever read to him.

The Court: Well, the Court—— [248]

Mr. Kay: Could I be heard briefly?

The Court: Yes, but I want—the Court would like to have it further understood that the Court has ruled as to the admissibility, or inadmissibility of the statement.

Mr. Plummer: Yes, sir.

The Court: That is final, therefore, any reference to that statement by any witnesses, the Court would consider to be highly improper.

Mr. Plummer: Yes, sir.

The Court: Because you can't come through the

back door if you can't come through the front door.

Mr. Plummer: I have cautioned him numerous times and I am sure he will not do that.

Mr. Kay: I believe the law to be on this question: that the real question is: did the inducement which produced the original confession continue and produce the second or subsequent admissions? Now, in this case, and under the rules, it is quite clear that the burden is on the Government to show that the inducement has ended or terminated if they seek to introduce evidence, subsequent statements or admissions when a prior confession has been excluded. Here, what was the inducement? As counsel pointed out, by Mr. Nesbett, the undisputed testimony that he had been advised that it would go easier with him if he confessed. There's been no negative of that influence continuing. In other words, once he had made a statement that influence would [249] continue on. If anybody asked him subsequently, "did you make a statement", he would naturally say, "yes", unless they simply advised him that inducement was wrong or terminated and it was not going to go easier with him.

The Court: Counsel, the Court has made it clear that the Court will not permit any witness to be called and testify concerning that statement, period.

Mr. Kay: I see.

The Court: Of any kind, whatsoever.

Mr. Nesbett: Judge, one more point. Now, you said you wouldn't allow him to come in the back door where he couldn't go in the front door, or words to that effect, he couldn't accomplish indi-

rectly what he couldn't directly. Here, the damage was done, all done at the time of the illegal detention in Seattle. There, it was done; there, the statement was made; there, the four page statement was made up; there, the Defendant was broken down. Under the circumstances, the law will not condone when still in custody and still not allowed the advice of counsel, although he may have—perfunctorily may have been advised of his right. He is still escorted around by the law and kept in jail between times. Your Honor, the spirit of the rule simply wouldn't permit the admission. Now, if it were independent facts they were attempting to elicit of some other crime, I would say the Carignan case might apply, but there isn't—is no such thing. What they want to do is elicit the facts in connection [250] with the same crime which he was forced to confess to.

The Court: Mr. Nesbett, apparently, you take the position that once evidence is adduced illegally, that there can be no evidence of a subsequent nature that can be produced thereby?

Mr. Hepp: I would like to——

Mr. Nesbett: To carry on with my point, the evidence, or, rather the confession which is stricken—you admit the confession is not permitted to go into evidence?

The Court: Yes.

Mr. Nesbett: Now, that being the case, the law officers cannot, in the psychological, confess under illegal circumstances, carry him around from place to place and ask him this and ask him that, in con-

nection with his confession. They had that all in mind; they were using that confession to locate spots and so on; they said so themselves in the hearing here, and it was during those conversations and those circumstances that he wants to bring up this evidence thru the back door that would not be admissible directly, thru the confession itself.

The Court: Mr. Hepp?

Mr. Hepp: I have only one thought, your Honor, and that is, it suggests to me that it is—it leaves us only a speculation on the part of the Court or Jury with, as to—if this confession which has been ruled out was not lawfully obtained, or was never obtained in the first instance, which we assume that it wasn't, if it's unlawful, would the Defendant have made subsequent statements but for the fact that he had previously made this confession and you certainly have to speculate as to whether he would or not. It's quite clear, of course, that having once told the whole story, he could only look ridiculous and say, "well, I deny the whole thing," particularly without the further benefit of counsel. It opens to speculation as to whether or not he would have ever made the subsequent statements.

The Court: Of course, the Court hasn't heard what this witness will testify to, nor the other witnesses at the present time, but I presume that the Court can safely infer that this Defendant was not coerced to go around in the car.

Mr. Hepp: Well, but my point is this, your Honor: that as it was said in the old days, "if you

break a man on the wheel, the fact that you remove the wheel then doesn't change his having been broken". I mean, the attribute, the character, the frame of mind, his disposition towards protecting himself, his constitution allows him, all those things are completely changed; once he has broken he can never recover to a former state as they say, "the wheels are removed and those who operated it are——"

Mr. Plummer: I think we are losing sight of your Honor's ruling yesterday. There was no finding by the Court—in fact, the Court would be bound by the testimony of the Defendant that, as a matter of fact, he was not denied the services of an attorney. He saw an attorney on Sunday, Monday and Tuesday, [252] and also, the Court knows from a review of the records he was arraigned down there on the 18th, and the Court, of course, would have at that time advised him of his rights in addition to which he was subsequently arraigned here; certainly——

Mr. Nesbett: He had nothing to protect any more.

Mr. Plummer: There's been no rack, or no wheel, and as a matter of fact, there was very, very little testimony to be, not at all to me, not at all to be convincing that he was induced or coerced to give the statement that he in fact did admit giving yesterday, or, yesterday admitted that he gave on the 17th, or whenever it was in March. As a matter of fact, your Honor's ruling, as I understood it, made the confession inadmissible, not because of a—

promises or threats and so on like that, but because of the illegal detention of the Defendant. I think your Honor said from the bench that he was arrested on a Friday afternoon and was not arraigned until the mistaken date that I gave you, the 19th, when it was in fact, the 18th, but I think that was the basis of your Honor's decision yesterday.

The Court: Well, so there won't be any doubt, the Court felt that the law enforcement officers had not complied with Rule 5. It's just that simple. Now, as to the questions of promises and things of that nature, I wouldn't exclude them entirely but the thrust of the ruling was upon Rule 5, and that the others were just ancillary facets and another fagot in the bundle of fagots toward the illegality of the confession obtained. [253]

Mr. Hepp: And the reason for the ruling.

The Court: Yes, that is correct—well, of course, the Court can't prejudge a matter. I am glad to have expression of opinions of counsel prior to his testimony, but until such time as it's been shown that this statement was obtained contrary to the law, I feel that the objection should be overruled pending that determination.

Mr. Plummer: I wonder, while counsel is still at the bench, if you would ask the witness to come over here so there will not be any possible mistake—admonish him not to use the word "polygraph", or "lie detector", anything like that, in his answers.

The Court: Is there any objection on that part?

Mr. Nesbett: No, I have no objection.

The Court: Will you come around, please?

(Thereupon, the witness approached the bench.)

The Court: Mr. Dankworth, Mr. Plummer advises me that you are with the Territorial Police and that you have specialized somewhat in the lie detecting?

Mr. Dankworth: That is correct.

The Court: Now, based upon stipulation of counsel, if there is no objection to the Court advising you, the Court will instruct you during your testimony, you are not to refer to a lie detector or polygraph or any other reference that may connect it up with that type of evidentiary obtainment. Do you understand [254] that?

Mr. Dankworth: Yes, sir, I understand that.

The Court: Very well, thank you.

(Thereupon, both counsel for the Plaintiff and the Defendants together with the Court Reporter and the witness resumed their respective seats, and the following proceedings were had in the presence of the jury:)

M. E. DANKWORTH

called as a witness for and on behalf of the Plaintiff, and being first duly sworn, testifies as follows on

Direct Examination

Q. (By Mr. Plummer): Would you please state your name, sir? A. M. E. Dankworth.

Q. Your occupation?

The Court: How do you spell that?

(Testimony of M. E. Dankworth.)

A. D-a-n-k-w-o-r-t-h.

Q. (By Mr. Plummer): Your occupation?

A. I am an officer with the Department of Territorial Police.

Q. Where are you stationed, sir?

A. Juneau, Alaska.

Q. Were you with the Territorial Police on or about March 7, 1957, sir? Were you employed by them on that date? [255]

A. Would you repeat the date, please?

Q. Were you employed by the Territorial Police on or about March 27, 1957?

A. Yes, sir, I was.

Q. And did you have occasion to be in Anchorage on that date? A. I did.

Q. Do you know the Defendant in this case, Charles E. Smith? A. I do.

Q. Did you have occasion to see Mr. Smith on March 27, 1957? A. I did.

Q. Would you tell us where you saw him?

A. I saw him at the Department of Territorial Police office, here in Anchorage.

Q. Did you have a conversation with him at the time you saw him? A. Yes, I did.

Q. Would you be good enough, sir, to relate what that conversation was?

Mr. Nesbett: I will object, your Honor to that. There has been no foundation laid or——

The Court: Objection sustained.

Q. (By Mr. Plummer): Will you tell us—the date, I presume, is March 27, 1957?

(Testimony of M. E. Dankworth.)

A. That's correct.

Q. The place?

A. It was the Territorial Police Headquarters, here in Anchorage. [256]

Q. And the time?

A. Approximately between one and one-thirty p.m.

Q. And the persons present?

A. Myself, Mr. Smith, and Mr. Harkabus.

Q. Now, did you have a conversation with him on that occasion? A. Yes, I did.

Q. And would you tell us what the conversation was about, sir?

Mr. Nesbett: Now, your Honor, I will object again, and ask that a hearing be held in connection with the circumstances of the evidence which we know is to be elicited from the witness by reason of our conference at the bench. I make that request for the purpose of the record.

The Court: Objection overruled. You may proceed.

Q. (By Mr. Plummer): Would you tell us what this conversation was about, sir? A. Yes, sir.

The Court: Now, just a moment, please. Would counsel come to the bench and would the witness come to the bench for just a moment, please?

Mr. Plummer: Yes, sir.

(Thereupon, both counsel for the Plaintiff and counsel for the Defendants, together with the Court Reporter, and witness approached the

(Testimony of M. E. Dankworth.)

bench and the following proceedings were had out of the presence of the Jury:)

The Court: Mr. Dankworth, because of the law, it was [257] necessary to rule that the statement made by Mr. Smith could not be admitted into evidence. Now, I did not apprise you of this, but any reference to that statement, likewise, is not admissible, in addition to the fact that you cannot refer to your employment and the type of employment that you are with, the Territorial Police. I must instruct you not to refer—if the conversation alluded to the statement because the statement has been determined to be inadmissible. You understand that now?

Mr. Dankworth: Yes, your Honor, I understand that.

The Court: All right. Thank you.

(Thereupon, both counsel for the Plaintiff and counsel for the Defendants, together with the witness and the Court Reporter resumed their respective seats and the following proceedings were had in the presence of the Jury:)

The Court: Do you remember the question?

A. I would like to have it repeated.

Q. (By Mr. Plummer): Would you be good enough to tell the Court and jury what the conversation was about, sir?

A. Yes. I was to interview, with Mr. Harkabus, Mr. Smith about a matter that has nothing to do at the present time with this case on trial.

(Testimony of M. E. Dankworth.)

Q. And did you in fact have such an interview?

A. I did.

Q. And did you conclude that portion of the interview? [258]

A. I did.

Q. And what did the Defendant say, if anything, at that time?

A. As I am testifying only to memory, there will be portions of it that I don't recall, but the portions that I do recall—the Defendant, Mr. Smith—if the Court will give me just one moment here——(pause).

The Court: Take your time.

A. As I recall the conversation, the Defendant was asked if he knew anyone who was involved in this particular matter which has nothing to do with this case. The Defendant stated that he did not want to be a stool pidgeon, or known as a stool pidgeon. He says, "I, in the past, have got mixed-up with the wrong crowd. I got mixed-up in the M-K check deal. I cashed the checks. I want to plead guilty and I want to serve my time, but I don't want to be a stool pidgeon."

Q. Do you recall anything else he may or may not have said, or you think he might have said on that occasion, sir?

A. Mr. Smith was asked what time or when did he come to Anchorage, in reference to the M-K check caper.

Q. And do you recall what he replied, sir?

A. Yes. I don't recall everything he said, but I

(Testimony of M. E. Dankworth.)

do recall this portion: Mr. Smith stated that he had arrived in his pick-up with a gentleman by the name of Volk from Fairbanks. Upon arrival in Anchorage they had stopped at the Westward [259] Inn at which time Mr. Volk left the pick-up. He had driven on to a bar somewhere within a block or two blocks of the Westward Inn. I don't recall, it seems that he mentioned the name of the bar, but it seemed like it was "Silver" something, or "Golden" something, but I don't recall the name of the bar. He said that he was to wait there for Mr. Volk to return. Shortly,—or, I don't recall the time element—it seems he said, after a while, this Mr. Volk returned to the bar that he was waiting in with a bag and two packages of M-K checks and an identification card which he had seen in the International Hotel in Fairbanks and the card, I don't recall the full name on the card, but I recall the name "Ware" was on it and his picture was on it and that the picture had been made by himself and I believe, as I recall, it could have been someone else, but it seemed like he said he and Mr. Volk had taken pictures of one another at the International Hotel. Mr. Smith stated at that time that he had asked Mr. Volk where the checks came from and that Mr. Volk advised him he was getting too nosey and it was none of his business and that Mr. Smith stated that he considered that good advice and never asked any more about it. He stated that he then proceeded with Mr. Volk to cash these M-K checks and I don't recall how many places—it seems

(Testimony of M. E. Dankworth.)

to me fifteen—ten to fifteen, I am not for sure of the number of places he said he cashed [260] them. After doing this, he had gone to, I believe a movie—yes, he had gone to a movie. I don't recall whether his movie was interrupted or after the movie, he was again contacted by this Mr. Volk, at which time he was told to—that something had happened in Fairbanks, and that it was necessary for them to return to Fairbanks immediately. He had stated that he had left his pick-up before going to the movie at a service station somewhere in the vicinity of the Westward Inn. After picking up their pick-up, they had gone out the Glenn Highway toward the Army camp and there was something he said in reference to—he recalls there was a lot of lights off to the lefthand side of the road which appeared to be a hotel or hospital or something and it was along this point in the highway that he and Mr. Volk had turned off onto a little side road, driven a short distance and stopped. There, they unloaded the merchandise they had bought with the M-K checks which consisted of some tires,—there was probably some other items, but I recall tires, battery and high-powered glasses and a hat and they had kept something, and it seems to me it was whiskey; I am not for sure, but it seems they kept some whiskey or apples or something, and that is about all that I recall, other than he says that at that time the money was in either a—wrapped in brown paper or it was in a paper bag, now, which one of the two, I don't recall, in the custody of Mr.

(Testimony of M. E. Dankworth.)

Volk [261] and they returned to Fairbanks. He was then asked if he would mind, or, if he would go out on the highway and show us where he dumped these things which he agreed to do. At that time, in the custody of Mr. Pass, and in the presence of Harkabus, Mr.—Sgt. Laird, Department of Territorial Police and myself, and Mr. Smith drove out on the Glenn Highway. Due to the snow, Mr. Smith wasn't able to find the exact road. He said he wasn't for sure just which road it was and there was a number that was leading off—at any rate, we were unable to find any of the things that he had thrown out of the truck at which time they returned and they let me out of the automobile at the Territorial Police Headquarters and that is the last time I seen Mr. Smith until this day.

Mr. Plummer: I have no further questions.

The Court: You may cross examine then.

Cross Examination

Q. (By Mr. Nesbett): That all occurred in the month of March, of 1957, Mr. Dankworth?

A. Yes.

Q. When you hesitated before you commenced to testify, were you trying to refresh your recollection? [262]

A. No, sir, I was taking in some cautions of the Court, that the Court had given me as to the wording.

Q. You weren't trying to get straight in your

(Testimony of M. E. Dankworth.)

mind the recitation you just have given, is that right?

A. No, sir, I was taking two things into consideration: the instructions of the Court and the continuity of what was said and when it was said, to begin it properly.

Q. Did you, during the time you hesitated, review the continuity of the recitation that you have just given to the Court? A. No.

Q. Now, Mr. Harkabus had Smith in custody at that time, didn't he?

A. I don't know which one of the officers had him in custody. He was in custody, but as to whether it was Mr. Pass or just who brought him out there, I don't know.

Q. He was brought to you from the jail here in the custody of those officers at the time you heard all this, wasn't he?

A. He was brought to the Territorial Police and reasonably, I suppose we could assume from the Federal Jail.

Q. And the purpose of Harkabus' purpose there was to investigate an entirely different matter than the issues in this case, is that right?

A. Yes—if the word investigate is correct. We wanted to discuss something with him with reference to another case.

Q. And did this—all this that you have recited happen just [263] casually after you completed or discussed the other matters with the original purpose of the visit?

(Testimony of M. E. Dankworth.)

A. That's true. The original purpose lasted a very short time as Mr. Smith made it quite clear, right quick, that he didn't want to be a stool pigeon and he started into this other.

Q. This other was just something that happened casually, after the main purpose had been taken care of, is that right?

A. Well, that is correct, to the extent that he had started talking after we had asked these other questions.

Q. Now, that was approximately a year ago, wasn't it?

A. Yes, March 27th.

Q. Lacking probably one month?

A. That's correct.

Q. Have you refreshed your recollection on the conversation in any fashion since that time?

A. Very little, other than discussing it with Mr. Plummer. That is all.

The Court: Any other cross examination? (no answer) Very well, any redirect, counsel?

Mr. Plummer: No, your Honor.

The Court: You may step down, Mr. Dankworth. Call your next witness. * * * * * [264]

February 26, 1958

Proceedings

(Before convening court, Mr. Nesbett filed a written motion, on behalf of Defendant Smith, to strike testimony of M. E. Dankworth.)

* * * * *

Mr. Nesbett: Does your Honor reserve any ruling on the motion?

The Court: Well, counsel, I can't, of course, even do that, or consider it until such time as we have had a chance to argue it. The Court hasn't even considered the motion. All I have done is read the motion and I, of course, am not in a position to reserve, and/or to rule at this time until I hear counsel argue.

Now, you may swear the witness. [267]

* * * * *

February 27, 1958
Proceedings

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The Court: Very well. Mr. Nesbett, did you wish to address the Court at this time?

Mr. Nesbett: Your Honor, I have appeared before this Court a long, long time and I think your Honor has done an exceptionally good job of handling this trial in a fair and impartial manner. I don't believe it could have been handled in a more fair and impartial manner. Your Honor, I think Mr. Plummer has been a real gentleman throughout the whole trial. Your Honor, I do, however, disagree of course with some of your Honor's rulings and with some of Mr. Plummer's ideas of what is admissible or relevant evidence.

There is now pending before your Honor for ruling the Motion that I submitted yesterday in writing to strike the testimony of witness Dankworth of the Territorial Police. If your Honor will permit, I will just mention that motion briefly.

The Court: You may do so.

Mr. Nesbett: Without arguing it at any length, because your Honor, that motion is based upon the

authorities that I have argued to your Honor previously in this case at some length, at no great length because your Honor indicated in each case, or, each instance that a case was mentioned, that your Honor was thoroughly familiar with it and I know you must be.

The Court: Well, for example, the McNabb and the [270] Carignan cases, principally.

Mr. Nesbett: The McNabb, Carignan, and the Mallory case, your Honor.

The Court: Yes.

Mr. Nesbett: The motion is based on the reason for that rule, Rule 5 of the Federal Rules of Criminal Procedure, and the balance of my argument, your Honor, will deal with the facts as they have been brought before this Court by the testimony of witnesses to the extent that I am permitted to mention those facts in view of the fact that we are not now in a closed session as we were when a number of them were brought out.

The Court: Well, we are closed to the extent the jurors are not in the courtroom. The bailiff has been posted at the door to keep all jurors from coming in.

Mr. Nesbett: I think your Honor made a very wise ruling when everyone not directly connected with the case was excluded, when certain of the evidence was heard and in support of that motion I only want to invite your Honor's attention to this fact, and that is the fact that Dankworth repeated almost word for word certain prior testimony that had been given to this Court and to mention to your

Honor that the pressures, the illegal pressures, that were brought to bear upon the Defendant Smith of which your Honor is well aware by reason of the testimony taken in the closed session, were still maintained and I don't feel even though the jury is not present at this session [271] that I can go much further into the comparison that I would very well like to make for whatever worth it may be to your Honor, of the testimony of Dankworth and the prior testimony except to mention in passing this one fact, your Honor, that I think the spirit of the rule has been thoroughly aborted and that those pressures were maintained. The reason for the rule was circumvented, or attempted to be circumvented and that the officer Harkabus breathing down the neck of the Defendant Smith all of the time was the reason that produced the statements of Dankworth and they should all be stricken; otherwise, there is no reason for the rule. It's emasculated; it has no force and I can't conceive in reading cases like the Carignan case, and particularly, the 1957 decision as late as June of last year of the Supreme Court in the Mallory case, I can't conceive that those courts saying what they did in those decisions, would condone a happening such as has occurred here by permitting Dankworth's testimony to be admitted.

So much for that, your Honor.

I wish also at this time for the purpose of the record to move for a judgment of acquittal with respect to the Defendant Smith. Based upon reasoning like this, it's my sincere belief that your

Honor should grant my motion to strike. If your Honor did that, then there would be left for the consideration of the jury only the testimony of Mrs. Shields and Mrs. Burnett and I think your Honor remembers very well the testimony of those [272] two ladies. There is a transcript of that testimony and on Page 8 and 13 of Shields' testimony, your Honor will observe that the witness first denied having any information from the District Attorney or his office in connection with the location or the identity of Smith, but later, admitted that not only had she, and I refer to Shields, had the Defendant pointed out to her, but a diagram had been drawn of the seating arrangement in the courtroom for her benefit so that they could go over and take a good look at Smith. Now, maybe she would have recognized him without that assistance; I doubt it. I think the assistance was accorded to her because she requested it. Your Honor can see the danger in that sort of practice.

There was the testimony of Burnett, Mrs. Burnett, which is even less reliable because she went to greater lengths it seemed to me, in studying the transcript of her testimony, to cover up, conceal, evade, direct answers to my questions which would have, and finally, did bring out the fact that she likewise had been advised, coached, and taught, you might say, who the Defendant Smith was, where she might find him so that she could put the finger on him, so to speak, at the right time and before the right people. That is all the testimony that could go before the jury. Now, your Honor, if that were

all the testimony that went to the jury even though the jury in view of everything that has been admitted here in the way of accomplice testimony and the whole surrounding picture of the case, including the secret sessions and conferences [273] too numerous to mention, at the bench of which, of course, we assume the jury knew nothing. Nevertheless, the jury might, in view of the aura of crime that has been thrown up by this trial, find Mr. Smith guilty and I'm sure your Honor would be duty-bound to set aside that verdict. I honestly believe that you couldn't allow the verdict to stand, as being not supported by sufficient evidence, and grant a motion notwithstanding the verdict.

Now, that is all I have to say, your Honor. Thank you.

The Court: Very well. Mr. Plummer.

Mr. Plummer: Your Honor, the defendants, all three have moved for a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure and I'll call your Honor's attention to the discussion in Barron and Holtzoff in Volume 4 at the very top of Page 235, where it says, and I quote: "In the decision of a motion for a judgment of acquittal, the Court must take that view of the evidence and inferences therefrom which is most favorable to the prosecution". Of course, that is Hornbrook law; cases so hold in our U.S. vs. Horton, 180 Fed. 2nd, Page 427, and Coppersmith vs. U.S., found in 176 Fed. 2nd, at Page 353, and Kowalechuk vs. U.S., found in 176 Fed. 2nd, at Page 873.

Now, there's been discussion by at least two coun-

sel and possibly three about the weight that the Court might give the testimony of the so-called accomplices. Of course, that is not the function of the Court. That is the function for the jury. [274] The only function for a court in a motion of this kind at this time is to decide whether there is evidence. It's not up to the court to decide whether it should be believed or not believed, but to decide whether there is evidence or not. The weight and credibility, of course, is for the function of the jury.

Now, let me first take up the case of the Defendant Ing.

* * * * *

Mr. Plummer: Next, as to the Defendant Wright——

* * * * *

Mr. Plummer: Now, we'll concede that Wright and Walker are accomplices.

Now, relative to the Defendant Smith, now, of course, there are admissions that he made to Officer Dankworth, which I maintained all along, are admissible and properly admissible, and certainly, Mr. Smith cannot be an accomplice to himself.

He said first to Mr. Dankworth that he passed numerous false and forged Morrison-Knudsen checks. In fact, he didn't even know for sure where he cashed them all. In addition to that, of course, there was a positive identification made by Mrs. Shields and by Helen Burnett and identification that you will recall from Mr. Barton that he was in there and cashed one of those M-K checks, but didn't know for sure which one of those he cashed, and

that the checks, as you will look at them, Exhibits 1 thru 5, are made out in the name of Wendell Ware, and were signed in the name of Wendell Ware, and it's the testimony of the [275] witnesses that this man appeared before them and signed the name of Wendell Ware on the checks.

Now, briefly, in closing, I would suggest to your Honor that the true rule is not to entirely strip the case of the accomplice testimony here. The true rule is that if the testimony of the accomplice is corroborated in material respects, that that is sufficient to sustain a conviction and as authority for that, I would cite your Honor *Teague vs. the State*, found in 81 Pacific 2nd, at Page 331; *Dykes vs. the State* found in 1 Southern Reporter, 2nd, at Page 754; *People vs. Wilson*, 153 Pacific 2nd, Page 721 and *People vs. Whittaker* found in 63 Pacific 2nd, Page 1202. The Southern cases are from—one from Oklahoma. I'm not familiar with their statute. The second Southern case, the 1 Southern 2nd case is an Alabama case. That has a statute very, very similar to ours and the California cases are, of course, under Section 1111 of the California code, which is identical with ours.

I therefore, request the Court that since there is ample corroborative evidence on all defendants, that the motions be denied.

* * * * *

The Court: * * * Mr. Nesbett, I wouldn't want to hear from you. The motion to strike the testimony is denied. I am of the opinion that while, and I am not determining at this time that there may

have been or that it was, there may have been [276] some duress, coercion, against the Defendant Smith prior to the time that he was arraigned, I feel that that was overcome by the fact that he was arraigned not only in Seattle before the Commissioner there, at which time he was represented by counsel, and further, that he was represented by counsel on the following day; that in addition thereto, he came to Anchorage and was arraigned at Anchorage and that sufficient time had elapsed, that is, between the 18th and 19th of March, 1957, and the 27th day of March, as I recall the testimony of Mr. Dankworth was to afford this Defendant an opportunity to have chartered his course as to his future action in response to his guilt or innocence. Now, as I recall, the testimony of Mr. Dankworth was to the effect that he was inquiring of Smith concerning another crime and was not even discussing this crime when in truth and in fact, according to Dankworth, the Defendant Smith volunteered the statements; he wasn't even asked about it, so I don't know how you could indicate from the evidence before the Court at this time that there was duress, coercion, or that the continuing pressure by the law enforcement officers was still urged upon him in this case.

Now, having determined that, I feel that the Motion For a Judgment of Acquittal in the case of Smith is not warranted and therefore, deny the same at this time.

* * * * *

The Court: Now, the laws provide that the De-

fendant [277] must state his defense and may briefly state the evidence he expects to offer in support thereof. (Glancing thru the Session Laws) I think you are right, Mr. Hepp, it provides as follows, and I am reading from Chapter 45 (reading) "provided that after the United States has produced its evidence and presented its case in chief, the Defendant or his counsel, if he intends to produce evidence must then state his defense and may briefly state the evidence he expects to offer in support of it". Since you do not intend then to produce any evidence, it will not be necessary under the law * * * Mr. Nesbett.

Mr. Nesbett: I wrote out that section before I appeared in court, your Honor, because I anticipated that I might be called upon to state my defense before all the other Defendants had stated their defense and I don't agree with the law and I think it's unconstitutional in a trial of this kind and I will state at this time, however, that the Defendant Charles Smith does not wish to state his defense.

The Court: Do you intend to produce any evidence?

Mr. Nesbett: It will depend upon whether anyone else takes the stand; I don't know. You see, your Honor, the difficulty in applying the law to the trial of a case of this kind——

The Court: Well, the Court has ruled that since Mr. Hepp for his client Wright invoked the rule, he would have to call his witness first if he intends to call him at all. He has now apprised the Court that he does not have to, or doesn't [278] intend to put

on any evidence; therefore, he need not call, of course, Mr. Wright. Now, that eliminates one defendant. Now, we have only left then, Mr. Smith and Mr. Ing.

Mr. Nesbett: Yes.

The Court: What do you intend to do, Mr. Kay?

Mr. Kay: Well, in the first place, I have made my opening statement, so we are beyond that point, your Honor.

The Court: Yes.

Mr. Kay: I, frankly, had not anticipated the action of Mr. Hepp in resting his, as he has a perfect right to do, of course, relying upon his theory of the defense. I would like, your Honor, and I don't—I am sure that we can finish this case today, so I am not imposing on the Court or jury in any way if I ask for a brief recess at this time to confer with the Defendant James Ing and with Mr. Gore if we could have ten minutes or fifteen minutes for a conference here. Your Honor, I would then be in a position to state what I plan to do.

The Court: Well——

Mr. Kay: That is not an unreasonable request; I hope the Court will not feel that it is.

The Court: No objection unless other counsel have objection.

Mr. Plummer: The Government has no objection, your Honor.

The Court: Very well, then the Court will go into [279] recess for a period of ten minutes.

(Thereupon, following a short recess the fol-

lowing proceedings were had in the presence of the jury:)

The Court: Let the record show all the jurors are back and present in the box. Mr. Kay.

Mr. Kay: Your Honor, the Defendant James Ing, relying upon the motion previously made, your Honor, rests his defense at this time.

The Court: Very well. Mr. Nesbett.

Mr. Nesbett: Your Honor, the Defendant Smith does not desire to produce any witnesses and rests his case upon the motion.

The Court: Very well.

* * * * *

Mr. Nesbett: * * * * * I do recommend, however, Mr. Kay's suggestion that we do adjourn until two and at this time, I would, for the purpose of the record and in the presence of the jury, renew the Motion For a Judgment of Acquittal on behalf of the Defendant Smith.

* * * * *

(Thereupon, the U. S. Attorney was called upon to proceed with his Closing Argument (the last portion) to the Jury, and the following proceedings were had:)

Mr. Plummer: I, like everybody else, have a difficult task ahead of me, due to the fact that I have to answer argument [280] and statements made by four different people and if I do them individually, I will be repetitious and keep harping on the same thing all the time. If I try to answer them as a group, I am liable to miss a point and I don't know what to do for sure, but what I am going to try

to do is to group them together and in the areas where their defenses are common, their arguments are common, try to meet them as much as I can as a group rather than individually to cut down on the time and to cut down on the repetition.

Now, there has been a lot of talk about feeling sorry for the people this afternoon. Now, I have a duty and you have a duty to feel sorry not only for the defendants here on trial, but you have a duty to feel sorry for the merchants and people in business in this community. While we are feeling sorry for people let's don't forget about that duty.

Now, I think probably the first argument that I will attempt to cover is that, with the exception of Mr. Nesbett, who did not have the common defense with the other parties, the other defense attorneys made this appear as though actually it was a matter of law; it's not a matter of fact at all; it's a matter of law. Well, nothing will be further from the truth. You will get your law from the Court. It's a factual issue. If it was to be decided as a matter of law, I wouldn't be standing right here right now. You wouldn't be sitting there right now. The Judge would have decided it before this time; so, it's not as they would have you believe, a matter of law. It's a factual issue that you will [281] have to decide.

While we are talking along those lines, let's talk about this accomplice instruction just a little bit. Mr. Hepp dwelled on it at some length. Mr. Kay dwelled on it for some length and I think the impression that they left may well have been a little confusing to you jurors. They kept talking about

taking away from the case the testimony of Walker and taking away the testimony of Taylor and seeing what was left. Now, that is not the way it should be done. There is nothing further from the truth. The Judge in Instruction No. 6 will tell you what you are supposed to do in Instruction No. 6 and then follow that instruction very carefully and if what they said was the law, to quote Mr. Kay, I will eat Instruction No. 6, or the paper upon which it's written.

Now, there's been some talk about the Government's witnesses who would lead—maybe didn't convince these people sitting around this table, but let me point out to you the three witnesses they attacked. Taylor, think about the cross examination on Taylor. How much cross examination was there? Just how much was there? And what—in what respect did they bring up any false or any deviation in his cross examination? Not one. Not one. And I think it's very indicative of what they felt, what they really felt because the cross examination as you recall was very, very limited.

The next Government witness that was criticized was [282] John Walker. They tried to bring out discrepancies on cross examination, and I submit, they didn't bring out a one; not a one.

The third man, Brownfield. They paint what a criminal history he's got. I'm not here to defend Brownfield, but I ask you, where in their cross examination, where in their cross examination did they cross him up in any point? Tell me where?

Now, I'll digress for just a minute on Mr. Hepp's

statement that all Mr. Wright was, was—actually, he didn't do much; all he was, was a chauffeur, was all he was; just a chauffeur. Somebody gets paid for chauffeuring somebody over a weekend for \$6,000.00. Does that sound logical? Does that make sense? If they do, I am in the wrong business, and I think probably, you are in the wrong business, if you can make \$6,000.00 a week in just chauffeuring somebody around town. I think it would be a real good business to be in.

Now, there's also much innuendo about the reliability about the Government's evidence. I say, and you know, it's the only evidence you have. If they didn't feel that it was reliable, why didn't they put on some evidence? Why didn't they put some evidence on? You have no choice; you have no evidence or no testimony other than that adduced by the Government witnesses, and by the Government—

Mr. Kay: I hesitate to interrupt Mr. Plummer's argument, but I want to register an objection to that line of argument as tending to violate the constitutional right the defendant [283] may have.

The Court: Well,—

Mr. Plummer: I didn't mention anybody, except, why didn't they put on a defense.

The Court: That is correct. Objection overruled. If it had referred to an individual, then I would concur, Mr. Kay.

Mr. Kay: They refer to three individuals at this counsel table, and no one else.

The Court: Of course, that is true.

Mr. Plummer: I didn't say—may counsel approach the bench for just a moment?

The Court: I don't think it's necessary, counsel. Let's proceed.

Mr. Plummer: Fine. Now, also, I think it was Mr. Hepp that conceived the idea that Mr. Walker and Taylor got real mad at Mr. Wright so they made up a story about him. Now, isn't it funny and don't it strike you as a little odd that if Walker and Taylor made up the story about Wright and about this transaction, that Brownfield, who was down at McNeil Island during the whole time that his story dovetails in perfectly with what they say. They certainly didn't go down to McNeil Island and see him and he didn't leave McNeil Island to come up here and see them. It's just—I think it's just a little peculiar if that is what has happened, that the two just dovetailed in just like hand in glove, corroborate each other right down the line. [284]

There was also a reference, I think, made by Mr. Hepp as to the fact that how foolish it was—how foolish it was to have three fires out there. Why didn't they just build one big bonfire, and why did they destroy the stuff at all? Well, I will tell you why they destroyed the stuff. They wanted to get rid of that identification and those checks before they got caught and the surest way to get rid of it was to burn it. We are not dealing with any school children here, and the reason they burned it separately was so they would not be called into a court of law, supposedly, some day to testify as to what each other burned. If they wanted to, they could

testify as to what they burned themselves, but not to what the other party burned. We are having an example of that right here in this trial.

Now, I'll next pass to the proposition supported chiefly by Mr. Kay that Mr. Brownfield is an accomplice to this operation down in Anchorage. Now, nothing could be further from the truth. He was engaged in a similar operation up at Fairbanks. He had nothing to do—he had nothing to do, and could not be charged with the operation down in Anchorage. The fact that he might have been charged with a separate crime or, with a different crime certainly does not make him an accomplice and you will be so instructed by the Court.

Now, the charge in this case is not interstate transportation or false securities or forged securities; it's not the forging of securities. It's the uttering and publishing of [285] specified securities, twenty in number, in the Anchorage area over the Labor Day weekend. There is no way that he can be an accomplice in that transaction.

Now, there was at least innuendo, I presume is as good a way to put it as any, that at the time Mr. Chenoweth, or Mr. Harkabus went down to see Mr. Brownfield down at McNeil, they made him promises of some kind. Well, Mr. Brownfield denied it from the stand, but that Mr. Kay was not satisfied, for if anybody was not satisfied with the answer that Mr. Brownfield gave, they could sit there and subpoena Mr. Jim Chenoweth, have him testify under oath as to what was said down there, and I am sure they will find Mr. Chenoweth is not a three-

time loser, and the same way with Mr. Harkabus, former Special Agent with the F.B.I. They could have subpoenaed him. He's here in town, available. If they wasn't satisfied with the answer that Brownfield gave, this other proof was readily available to them, if they would have just used it. Why they didn't, I don't know, but since they didn't, they're going to have to be satisfied with the answer that Brownfield gave because that is the only answer there is in front of you. That is the only answer you have.

Now, next, addressing to—my remarks to Mr. Kay's assumption that, I guess again by innuendo, that we should have arrested everybody that stayed down at the Westward Inn that night. Well, let me point out a few differences between the Defendant Ing and the other people that stayed down at the Westward Inn [286] that day. The first difference is that the Defendant Ing received a phone call or two from Wright and Wright went down to the Westward Inn and came back with some checks, the Morrison-Knudsen checks, the false I.D. cards; and next, Mr. Volk went down to the Westward Inn and came back a short while later with some false I.D. cards and some phony Morrison-Knudsen checks; and I will go along with Mr. Kay to this extent, anybody who was staying there under those circumstances, should have been arrested and the only person, of course, there was, Mr. Ing. He was arrested.

Another thing, Mr. Kay, of course, is a—has been very active in the Legislature. He—as the remark

was made in court this morning, that he—the amendment that your Honor was looking for was—Mr. Hepp was going to make, either make a statement, or, not make a statement, I think he was in the Legislature when that was passed. He had been very active in the Legislature. You will note that on the Exhibit you have the pink identification card. May I see it for just a minute, the pink driver's license (talking to the In-Court-Deputy); the date on the license was 1952. Now, Mr. Kay knows, because he was in the Legislature at that time that at that time the Department of Taxation handled driver's licenses. Now, the Department of Territorial Police handles the licenses and the records are no longer available. They never were available to the Territorial Police.

Mr. Kay: I must object to that, your Honor, and ask [287] that that be stricken. That is an improper argument. There is no argument—evidence, whatever, of that fact.

The Court: Objection sustained.

Mr. Kay: And the jury be admonished.

The Court: Well, the Court instructs the jurors not to consider the statement made by Mr. Plummer in that regard.

Mr. Plummer: Only the last statement, is that correct?

The Court: Yes, that is correct, since there isn't any evidence before the Court as to whether the records have been, or, are not available——

Mr. Plummer: Yes, sir, I wish to apologize.

The Court: Are not now available.

Mr. Plummer: Further, in regard to the—I don't mean testimony, but the argument of Mr. Kay, he told you people that there was not one word to connect the Defendant Ing with these checks. I don't understand his statement. He certainly was here when Mr. Brownfield testified. I don't understand the statement, but if I recall him correctly, that is the statement he made. Also, he was sitting here in court, I believe, when George Hooker was on the stand and George said that Ing was staying down there. I think Wendell was in the courtroom, I hope he was, anyway, at the time that Mr. Dankworth was on the stand and told about the admissions made by the Defendant Smith of having Volk go up to the hotel where he was staying, up at the Westward Inn—I'm sorry—and picking up the checks and I think he was also [288] here in the courtroom when they were telling about Mr. Wright also going up to the Westward Inn and coming back with some checks. So, I am, if I understood Mr. Kay correctly, and I think I did, because I think he said it quite emphatically, I am at a little loss to explain or to understand his statement.

Now, further, in regard to an assertion made by Mr. Kay which is, and in fact, the same assertion made by Mr. Hepp when he first started to argue, is that the Defendants in this case would have to be proved guilty without a reasonable doubt, beyond a reasonable doubt by the corroborative evidence alone; he is going to try and kill an elephant with a grain of sand. That is not the law and that's not the Court's instructions. The Court's instructions is

that all the evidence taken together will convict him; not one little parcel here, or an isolated parcel there. It's the sum total of all the evidence, as the Court will instruct you in Count No. 6.

I think that I probably covered this just slightly. I refer now to the things that Mr. Kay referred to as "neutral facts". All the corroborative evidence was neutral facts—twenty checks that were seen up in Fairbanks, were next negotiated down here—that is a neutral fact? The fact that Mr. Ing stayed up in the hotel at the Westward Inn, that is a neutral fact? The fact that Volk went down there and got checks, that is a neutral fact? The fact that Wright went down there and got checks, that is a neutral fact? The fact that he took this picture, [289] is that a neutral fact? The fact that he gave this man this driver's license, is that a neutral fact? If they're neutral, I am real surprised. If they're neutral, I don't know the meaning of the word "neutral".

Now, jumping to Mr. Gore's speech for—or argument—for just a minute, he mentioned that it would be very, very foolish, he seemed to think, for Brownfield to accept this package at the tavern there in Chicago. I don't see why that is foolish because that is precisely what he, the Defendant Ing, arranged for. There is nothing foolish about that. If you are doing business with somebody, and he says somebody is going to come by there and leave you a bundle, you take the bundle.

One other brief mention that is not important, and I probably shouldn't delay on the matter, ex-

cept that I believe Mr. Gore misquoted the law somewhat, that I think, that the penalty on the habitual, the maximum is life. I don't think there is any minimum. It can be suspended; it can be done, anything. It doesn't make any difference. He made quite a story about Mr. Walker, attempting to attack his credibility. They never shook him on the stand one iota. They, in so far as I could see, they did get him to say, although he quit gambling, that he actually was a dealer in some cardhouse that they have up in Fairbanks. Well, you people that are gamblers, or, not gamblers, but you people that know more about it than myself, probably know more about it than I do, but I am under the impression if you are a dealer, [290] you can't gamble. You're in there; you take a cut for the house; you don't sit in there and beat and gamble. That, also, is unimportant.

Now, there is also—mention was made, I think, by Mr. Gore, that you must be able to say, of course, in answer to your conscience, that you have done your duty to these defendants. Well, in addition to that, in answer to your conscience, you must be able to say that you have done your duty to your country and to the community in which you live; and on the evidence, on the evidence, it's clear where your duty lies. There is no evidence except that presented by the Government and it's not been refuted; it's not been refuted; not one word of it. Now, if they wanted both Williamson, anybody like that, to testify, Mr. Chenoweth, Mr. Harkabus, or anybody, they could have had them testify. It

would have been just as simple as going to the Clerk's Office and getting a subpoena; just that simple.

Now, we jump to Mr. Nesbett's mention about the Defendant Smith. If I would have been on the stand in place of Mrs. Shields—Mrs. Shields, Virginia Shields—and I would have been asked about a conversation with Mrs. Shields, I would have said “No,” because she had not had a conversation with me and that was the question: Have you had a conversation with the United States Attorney? She said “no”. Later, it developed that she had had a conversation with some other police officers, but that wasn't the question that she answered “no” to.

Now,—and let me—much has been said about Helen Burnett, also, and her being so positive and being so anxious to help out the Government. Let me point out that both Virginia Shields and Helen Burnett, under oath, when asked by me on redirect, I asked them if there was any doubt, if they were positive in their mind that this was the man, at that time pointed to Mr. Smith; they said, “none at all. That's him.”.

Now, I noticed when Mr. Nesbett was up here, he mentioned about having a transcript of the testimony and he waved a piece of paper around, but he never read what the testimony was. As I recall, his recollection of the testimony on Shields and Mrs. Burnett was about the same as my recollection, but at that point, we part when we get talking about Mr. Barton, from the Union Club. It's my recollection of the testimony of Mr. Barton's testimony,

that he said he did recognize Smith and he did recall that he cashed an M-K check there on that weekend, but what he couldn't do, he had three bogus checks, and he couldn't pin this Defendant Smith down to any one of those three checks, which was the question asked to him, but he did say that he was in there and cashed one of those bogus M-K checks and, of course, you know from his own admissions to Officer Dankworth, that the one he cashed was the one made out to Wendell Ware and endorsed by Wendell Ware, and he—you also know that if there was a check passed at the Hub Clothing Company made out to Wendell Ware, that by his own admission, he is guilty of passing that in spite of the fact [292] that Mr. Futor couldn't remember him. By his own admissions, he is charged, or, I will say this: he is charged with five counts in the indictment; by his own admission he cashed thirteen to fifteen checks.

Now, there was some comment by Mr. Nesbitt about the vagueness of the testimony of Mr. Dankworth. Well, let me point out to you people what you no doubt have already guessed and know—you are probably ahead of me. He was testifying as to what Smith told him. He couldn't make up facts. If Smith was vague when he told him, the only thing he could do was repeat what Smith said. He couldn't fill in and make up facts of his own. He was limited to the admissions made by the Defendant Smith.

Now, let me bore you just one more time on the subject of corroboration. You have heard it until

you are probably sick of it, but let me impress it on you just one more time, if I may, and I will be brief. It's my contention, and I am sure that you will agree, that the testimony of the accomplices, and there were only two accomplices, Walker and Taylor, have been amply corroborated. In fact, there has been nothing to disprove the truth of every statement they have made; not a thing. Now, in regard to Smith, of course, it's not a problem with Smith because there was no accomplice testimony concerning him, as Mr. Nesbett so ably pointed out.

Now, to go to the Defendant Wright in the way of corroboration. There is the testimony of Eli Williams, placing [293] him in town that weekend, staying at Eli Williams' house. There is the testimony of Yokely that he saw Wright, Williams and Taylor together at Williams' house. There is also the very important and very telling incident on February 12th, out at the Club Oasis, where the Defendant Wright made threats against the witness Taylor to try to prevent him from testifying. All right, in addition to that, there's the physical evidence of the checks. You will have them there in front of you up in the juryroom, that he gave to Taylor and Walker, made out in the names that they said they were made out in, endorsed in the name that they said they were endorsed out in, and deposited with identification to these thirteen or fourteen people we had in here to testify that they were the people that were there passing as James

Wood in the first place and as Thomas Brown in the second place, the same two people that were here in this courtroom.

As to the Defendant Ing, there is the corroboration of the testimony of Mr. Hooker in the hotel rooms. There is the false identification with the picture that he took of Mr. Brownfield still on the I. D. There is a driver's license and I ask you when you get up there, look at it closely, look at the top line, and you will see a writing underneath that appears, at least to me, to be James Ing. Underneath the Charles Lappa, which the Ing has been written out, erased out, and Lappa written overneath it; and, last, but not least, there are the—all the checks in this case, Exhibit 1 through 19 and 21 which were given to the [294] Defendant Ing in Fairbanks, ended up down here, being negotiated to the merchants here in town.

Now, let me recall, if you will, when the trial concluded somewhat earlier this morning than at least I anticipated, at that time, Mr. Hepp, representing the defense of Raymond Wright, merely advised the Court that he would rest the defense of Raymond Wright at this time. Mr. Kay, representing the Defendant Ing, did likewise, and rested his defense at that time. Those were his words. Mr. Nesbett, who is representing the Defendant Smith, stated he did not desire to produce any witnesses and rested his case upon the motions. The last thing—now, let me retract that. There is not one shred—there is not one shred of evidence produced in this case for you folks to consider, except the

evidence adduced by the Government, and I feel that it is overwhelming, and I think you must too.

In closing, I want to thank you people for your kind attention to the evidence during the trial. It's been a long trial and it's been because of the number of parties involved and the number of attorneys involved. It's been difficult to follow and not too exciting. Now, I want to thank you for your kind attention during the presentation of the evidence. As I said before, it's been a long trial and a hard trial, but before the matter ever got to the trial stage, police officers did work long and they worked hard, and they have done their duty. The Grand Jury considered the evidence and they did their duty. [295]

Mr. Nesbett: I will object to any argument along such lines, your Honor. That has nothing to do with the issues in this case. There is nothing in evidence as to what the Grand Jury did, or did not do. It's improper and I object.

The Court: Objection sustained, Mr. Plummer.

Mr. Plummer: Very good. Do you wish to tell the jury to disregard my last remark?

The Court: I haven't been requested to.

Mr. Plummer: All right. The merchants who were defrauded in this swindle have taken their time away from their business and come to this court to act as witnesses. They have done their duty. The Court has been very patient and conducted a fair and impartial trial and has done its duty. I presented the evidence as best I can and I have done my duty. I now request that you do your

duty and convict these defendants. Thank you.

The Court: Very well, Mr. Plummer. Counsel may come to the bench and take exceptions, if any they have to the instructions prepared by the Court.

* * * * *

United States of America,
Territory of Alaska—ss.

I, Iris L. Stafford, Official Court Reporter of the above-entitled Court, hereby certify:

That the foregoing is a true and correct transcript of excerpt of proceedings on the trial of the above-entitled action, taken by me in stenograph in open court at Anchorage, Alaska, on February 18, 19, and 20, 1958, and thereafter transcribed by me.

/s/ IRIS L. STAFFORD.

United States of America,
Territory of Alaska—ss.

I, Bonnie T. Brick, Official Court Reporter of the above-entitled Court, hereby certify:

That the foregoing is a true and correct transcript of excerpt of proceedings on the trial of the above-entitled action, taken by me in stenograph in open court at Anchorage, Alaska, on February 24, 25, 26, and 27, 1958, and thereafter transcribed by me.

/s/ BONNIE T. BRICK.

[Endorsed]: Filed May 16, 1958. [297]

[Endorsed]: No. 16041. United States Court of Appeals for the Ninth Circuit. Charles E. Smith, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Third Division.

Filed: May 23, 1958.

Docketed: June 12, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16041

CHARLES E. SMITH, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

ADOPTION OF STATEMENT OF POINTS

Appellant herein, through his attorney, Buell A. Nesbett, hereby adopts the typewritten statement of points on appeal heretofore filed in this case and dated March 11, 1958. A typewritten copy of such statement of points on appeal is enclosed herewith and attached to this adoption.

Dated at Anchorage, Alaska, this 9th day of June, 1958.

/s/ BUELL A. NESBETT,

Attorney for Appellant.

[Endorsed]: Filed June 13, 1958. Paul P. O'Brien, Clerk.

